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SUPREME COURT OF THE UNITED STATES

October Term, 1947

No. 66

WESLEY WILLIAM COX
Petitioner

v.

THE UNITED STATES OF AMERICA

No. 67

THEODORE ROMAINE THOMPSON
Petitioner

v.

THE UNITED STATES OF AMERICA

No. 68

WILBUR ROSUM
Petitioner

v.

THE UNITED STATES OF AMERICA

ON CERTIORARI TO
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITIONERS' JOINT PETITION FOR REHEARING

HAYDEN C. COVINGTON
Counsel

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ON CERTIORARI TO

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

PETITIONERS' JOINT PETITION FOR REHEARING

MAY IT PLEASE THE COURT:

To persuade one Justice, concurring in the judgment, to desire reconsideration and to aid a majority of the Court to so determine, is the purpose of this petition.

NOTE: Lack of a unanimous majority opinion with one Justice concurring in result only leaves the law in confusion. See pp. 58-59, *infra*, this petition.

GROUNDS

One

Grave error was committed by the Court in giving a strict and narrow interpretation to the ministerial exemption of the Act contrary to history, policy, the spirit of the nation, and former decisions of the Court in considering similar exemptions provided for in other statutes.

Two

The Court misread the mind of Congress contrary to the plain intention expressed in the Act and declared by the President in the Regulations and unlawfully confined the exemption to only those ministers who came up to the standards of the orthodox clergy, as conceived by the personal religious notions of the Justices who joined in the controlling opinion.

Three

The Court erred in adding provisions to the Act and Regulations so as to require that the entire time of a minister be devoted to his ministry and that his sole financial support be from his congregation rather than extending the exemption to those who regularly and customarily teach and preach the doctrines and principles of a recognized church as the Act and Regulations plainly state, for the simple reason that it is not within the province of the Court to legislate, but only to interpret the legislation involved according to reason to avoid discrimination.

Four

The Court erred in setting itself up as a religious hierarchy to determine the qualifications of a minister according to the orthodox views of the members of the Court that joined in the controlling opinion, which limits the exemption to some ministers of some groups, instead of interpreting the law so as to apply equality to all ministers of all denominations and accomplish equal justice under law.

Five

The Court erred in abdicating its judicial power to determine the law as applied to the undisputed evidence and facts before the administrative agency and acted as a rubber stamp to execute the decision of a question of law by the administrative agency, thus bringing the statute into collision with Article III of the United States Constitution and converting the Act into a Bill of Pains and Penalties contrary to Clause 3, Section 9 of Article I of the Constitution.

Six

The Court committed fundamental error in overruling the assignments of error.

Seven

The Court committed fundamental error in affirming the judgments of the court below.

PRELIMINARY STATEMENT

The mere fact that the exemption of ministers appears in a statute designed for national defense in time of a great emergency does not warrant a rigid limitation of it. The legal 'benefits of clergy' provided for in the Act is no more restricted than such benefits similarly appearing in other acts and the Constitution. One who is a minister of the gospel sufficiently to claim protection of the 'benefits of clergy' provisions of the freedom of worship guarantee of the First Amendment to the Constitution should also be entitled to claim the 'benefits of clergy' exemption of the Act when it appears that he regularly and customarily teaches and preaches the principles of a recognized organization that sends him forth and recognizes him as a minister of religion.

In the absence of plain words showing an intention of the Congress to discriminate against some ministers of some organizations, such should not be read into the Act. The Court has no more authority to read such discrimination into the Act than it would have authority to read a similar limitation, which discriminated, into the Bill of Rights guaranteeing freedom to preach.

Such restrictive limitation adopted by the Court in these cases cannot be sustained on the ground that the Act was an emergency measure. Plain words even of emergency laws are not to be given strained and restrictive definitions unless it plainly appears to be expressly required by the law in which such specific words are used. (*Davies Warehouse Co.* v. *Bowles,* 321 U. S. 144, 149-151) It should be remembered that the Constitution itself was a creature of an emergency. All know that the 'crisis of the confederation' following the end of the Revolutionary War presented a greater national emergency than the war itself. It was out of the struggle with the internal forces to divide the people that the Constitution came. It has been the refusal to re-

strict its beneficent terms in times of stress that has held the states together and kept the nation alive this long. Since the Court has no authority to restrict the securities in the Constitution in times of emergency it has no authority to legislate restrictions onto an exemption contained in an emergency law contrary to plain language and history of the Act as has been done here.

The restrictive interpretation of the Act in this case was an unnecessary contribution to the war effort. The successful prosecution of a war does not depend on the denial or restriction of the traditional exemption of ministers of religion from the performance of military service. The exemption provision in the Act, like the provisions of the First Amendment, is "a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes" of ministers, at "all times, and under all circumstances. No doctrine, involving more pernicious consequences was ever invented by the writ of man than that any of its provisions can be suspended during any of the great exigencies of government." (Ex parte *Milligan*, 2 Wall. 2, 120)

In dealing with people in the execution of a war measure such as the Selective Training and Service Act, designed as it was to protect the nation against aggression, there is a natural tendency to be impatient with all who do not fall into but who claim to stand on the outside of the 'manpower barrel'. All unorthodox groups that claim the benefits of the orthodox exemptions are frowned upon and viewed with suspicion, especially the unpopular groups like Jehovah's witnesses. But it should be remembered that the Act, spawned in an approaching hurricane of a totalitarian war, an emergency as great as the one that generated the Constitution, provided for exemption of all ministers of religion in spite of the emergency. This provision was made by Congress without discrimination, in the same way as the benefits in the First Amendment were made, also an

emergency measure. If the ministers of Jehovah's witnesses are protected under the Constitution (*Murdock v. Pennsylvania*, 319 U. S. 105) then why are they not given similar protection under the Act and Regulations here involved?

You may say, "Oh! But that Act was different. It was passed to wage total war and save the United States from acts of aggression." Again in answer, Was not the Constitution adopted under equally as great an emergency? Was the Selective Training and Service Act as an engine to be used in sacrificing the institutions the Constitution was created to preserve and protect? No! The Congress knew that there was no sense in creating a battle front without preserving the liberties of the people on the home front. The very purpose of raising a great armed force was to protect and preserve, above all other things, the heritages for which the founding fathers fought—civil liberties, the most outstanding being freedom of worship—which are valueless without ministers. What good does it do a people to have freedom of worship without a preacher? "How then shall they call on him in whom they have not believed? and how shall they believe in him of whom they have not heard? and how shall they hear without a preacher? And how shall they preach, except they be sent? as it is written, How beautiful are the feet of them that preach the gospel of peace, and bring glad tidings of good things!" (The apostle Paul at Romans 10:14-15). The very purpose of having ministers is to lead and guide the people in learning how to worship.

The natural complement of freedom to worship are ministers. Not "some" ministers of "some" denominations but "all" the ministers of "all" organizations are necessary. There is not the faintest suggestion or reason that Congress intended to confine the exemption to only "some" ministers of "some" denominations any more than there is a suggestion that Congress intended to limit the deferment to only "some" judges, Congressmen, state legislators, gov-

ernors and other deferred persons. It extends to all such. A discrimination cannot be imputed or implicitly found in the Act even when a specter like that seen through the controlling opinion in these cases appears.

We cannot help but feel that the Court has been influenced, unconsciously perhaps, by the policy arguments of the Government in all the draft cases of Jehovah's witnesses running all the way back to the argument in *Falbo* v. *United States*, 320 U. S. 549. In all these cases the Government has persisted in spreading jaundice through throwing up an apparition of terror and a phantasm of catastrophe if the Court should sustain the contentions of Jehovah's witnesses as to the construction to be given Section 5 (d) and its implementing Regulations.

The policy arguments of the governments are the same as those urged upon the rulers in ancient times concerning another one of God's servants. The case referred to is that concerning the faithful and youthful prophet Jeremiah. The time was a break in the siege by the Chaldean army. The scene was at the city of Benjamin. Jeremiah was arrested and jailed because of his preaching which he refused to stop. He was finally brought before the king on a writ where he was confronted by his accusers, the princes engaging in defense of the country and the city. They said to the king: "We beseech thee, let this man be put to death: for thus he weakeneth the hands of the men of war that remain in this city, and the hands of all the people, in speaking such words unto them: for this man seeketh not the welfare of this people, but the hurt." Then the king, Zedekiah, said: "Behold, he is in your hand: for the king is not he that can do anything against you." (Jeremiah 38: 4-5) Jeremiah was then put in a miry dungeon by the administrative authorities to die, where he remained until released through the importuning and help of Ebed-melech. (Jeremiah 38: 6-17) Certain it is that the policy arguments of the Government, identical to the policy argument of the

government that put Jeremiah in the dungeon, has got Jehovah's witnesses into a jam. This is a modern-day counterpart of his predicament where Jehovah's witnesses will remain unless and until some 'modern-day Ebed-melech' persuades the Court to grant this motion or reverse the erroneous decision in these cases.

Even in times of great emergencies a great nation does not suffer from liberality of treatment of those whose work is dedicated to furtherance of the worship of Almighty God, Jehovah. Throughout history great world powers and nations have traditionally exempted ministers from the performance of military training and service and the record shows that the strong nations dedicated to liberty were not parsimonious in the granting of the exemption.

Before the Roman Empire became a world power the nation of Israel conscripted men to wage war. (Numbers 1:1, 3, 45, 46; 2:32-34; 26:1, 2) The conscription law of the Israelites also provided for exemption of the ministers and priests known as "Levites". (Numbers 1:47-54; 2:33) Twenty-three thousand, a relatively large percentage of those of military age on the first conscription call, were ordered to be completely exempt accerding to the record. (Numbers 26:62) The exemption was quite liberal, showing the confidence of the nation in the power that was backing it up in battles. The exemption was broad enough to include men who devoted only a "small fragment" of their time to the performance of their priestly duties. The record shows that the Jewish Levites actually served only two (2) weeks out of each year directly at the temple and at the three national annual feasts. But during the rest of the year they were permitted to remain at home to care for their family and do their own gardening, as well as any incidental local teaching and preaching that they might desire to do among the people in their home communities. (1 Chron. 24:1-19; Neh. 12:27-30; Num. 35:1-8; Luke 1:5-24) Their special consecration to Jehovah God sanctified

them to a different status from that of the rest of the Jewish population irrespective of the small amount of time devoted by them to the actual performance of their priestly duties.

With a system of conscription that had such broad and liberal exemption provisions the Jewish nation waged many wars and fought successfully many battles. If a small but powerful nation like Israel could afford to be liberal under its conscription laws during great national emergencies it seems that a mighty world-power like United States of America would not be endangered by being similarly liberal. Not until the Jewish nation became weak and tottering and forced to depend upon the support of friendly heathen nations for protection and salvation in times of war did the Israelites deny the exemption and curtail freedom on the home-front, as in the case of Jeremiah mentioned above. It is appropriate to remind the Court of the famous words of the great wartime President, Franklin D. Roosevelt, to wit: "We have nothing to fear but fear itself."

The phantom policy argument that if exemption were permitted to Jehovah's witnesses under the Act that effective war effort cannot be accomplished disappears when a realistic view of the facts is taken. During the war just ended there was no evidence that the people made use of Jehovah's witnesses to evade military duty. Being one of Jehovah's witnesses requires the unpopular following in the footsteps of Jesus in preaching, like Paul, publicly and from house to house. The heat of this unpopularity and the burden of the work is so great that it is not likely that a large number could stand it especially if their motives were to solely evade service. There is no evidence that any large number of Jehovah's witnesses, who claimed exemption, were insincere or engaged in the ministry to evade service. The number of such was infinitestimal. With all of its unlimited investigative powers and facilities the Government has failed to establish that Jehovah's witnesses

pursued the policy of claiming exemption to evade service. The undisputed evidence shows that they attempted to take advantage of their legal rights to protect themselves in their sincere effort to stick to their missionary evangelistic field as provided for under Section 5 (d) of the Act. Therefore to permit a rule to be formulated which will result in the persecution of many regular ministers for the purpose of getting at a few 'evaders' is like the folly of the man who burned part of his barn down to roast the pig.

A narrow construction which excludes a few of Jehovah's witnesses from the benefits of clergy provided for in a conscription Act results in no practical benefit to the war effort of the nation. Witness the results under the Act in question during this nation's participation in the recent conflict. Over four thousand of Jehovah's witnesses went to prison because of the narrow views of the draft boards under this Act. They were taken out of the civil population and put in prison. Even had this number received the exemption granted by the Act the nation would not have been weakened in the war effort.

The success or failure of the future military operations of this nation will not depend upon whether this Court gives a broad or liberal interpretation upon the Congressional exemption granted to ministers of religion. In this atomic age the forced presence of ministers of religion in the armed forces or prisons will not matter much in practical results. The holocaust of war, hitherto confined primarily to the battlefields, are now (through the atomic bomb) lurking at the doorsteps of every home of the home-front or nation. With the civilian population drawn right into the battlefield itself there is reason now, more than ever before, to give a broad and liberal interpretation to the exemption provisions of the Act so that the people can be insured of having sufficient ministers to serve them and sustain their morale during the suffering that they

may be forced to endure. The very purpose of the exemption was to prevent "disruption of public worship and religious solace to the people at large which would be caused by their induction." *Trainin* v. *Cain*, CCA-2, 144 F. 2d 944.

In this age of atomic warfare, the real and only protection of the people is from Almighty God. An armed force, according to the consensus of the military authorities and scientists, will be a weak defense against such weapon. At least a wise people would not risk the chance of losing protection of Almighty God by banishing His ministers from their fields of ministry. Peoples in times of old who showed favor to God's people were blessed and protected by God. Note the benefits of Egypt during the days of Joseph (Genesis, chapters 41-50), and the experiences of Hiram, king of Tyre, in the days of King Solomon (1 Kings, chapters 5-7). Many others could be named. Compare the misfortunes of the nations that persecuted God's people. Egypt was devastated at the Red Sea. (Exodus, chapters 1-14) Moab, Ammon and Edom were destroyed in battle. (2 Chron. 20:1-35) Sennacherib was destroyed during an attack against Judah. (Isaiah, chapters 36-37) The world power Babylon was destroyed completely. (Jeremiah, chapters 50-51) All were destroyed because of their persecution or conniving at the persecution of the Lord's faithful servants or ministers.

The greatest contribution the members of this Court can make to the strength of the nation in any time of crisis or war or other national emergency is to preserve the institutions of democracy which the founding fathers fought so valiantly to protect against any and all encroachments. To take a course of abdicating and abandoning a small unorthodox and helpless group through a fiction of 'finality' of administrative determination is not salubrious to the nation itself. The fear of a breakup or disintegration of the national defense effort, fear of the enemy, or the fear of anything except the Constitutional mandate (faithful exer-

cise of the judicial function) inevitably leads to a trap and to a disintegration of the institutions of the republic itself. "The fear of man bringeth a snare: but whoso putteth his trust in the Lord shall be safe." (Proverbs 29:25) "The fear of the Lord is the beginning of wisdom." (Psalm 111:10)

INTERPOLATION

A

Simultaneously with the filing of this petition for rehearing there is filed a petition for writ of certiorari in the case of *Frederick Francis Zieber, Jr.* v. *United States.* In addition to the questions presented about the violation of the rights of Zieber to procedural due process by the local board, there is also presented there a question similar to that involved in these cases. The question urged by Zieber is whether the draft board acted arbitrarily and capriciously in rejecting Zieber's claim for exemption as a minister of religion. Although the facts in the case are somewhat similar to the facts in these cases, the draft board file is more explicit and full and shows in detail the orthodox ministerial standing of Zieber. Zieber is asking this Court to review the determination of the Court of Appeals which was that the draft board's action denying him his claim for exemption was valid. The Zieber petition for writ of certiorari presents again to the Court about the same question involved in these cases upon this petition. Accordingly, this Court is requested to defer ruling upon the petition for rehearing until the petition for writ of certiorari in *Frederick Francis Zieber, Jr.* v. *United States* is considered and determined.

B

It is the feeling of petitioners that the issue of exemption of petitioners from training and service was not as fully briefed and argued as it was in previous cases where it was not reached. (*Falbo* v. *United States*, 320 U. S. 549; *Estep* v. *United States*, 327 U. S. 114; *Smith* v. *United States*, 327 U. S. 114; *Dodez* v. *United States*, 329 U. S. 338; *Gibson* v. *United States*, 329 U. S. 338; *Sunal* v. *Large*, 67 S. Ct. 1588; *Alexander* v. *Kulick*, 67 S. Ct. 1588) Petitioners had every reason to believe that the Court would not pass upon the question as it did in those cases. In those cases it was avoided and decision of the question was not reached. In fact, the determination of the appellate courts in the *Smith* and *Dodez* cases, although misinterpreting the *Falbo* decision, also relied upon the same basis for affirmance of convictions, as did the court below in these cases. (*Smith* v. *United States*, CCA-4, 148 F. 2d 288; *Dodez* v. *United States*, CCA-6, 157 F. 2d 637.) Previously in the *Falbo*, *Estep*, *Smith*, *Dodez*, *Gibson*, *Sunal* and *Kulick* cases the Court did not decide the question. Therefore, the petitioners considered that the question would not be given any more consideration than was given to the question in the *Smith* and *Dodez* cases. There it was raised and could have been passed upon, as here. Not desiring to burden the Court with an argument as extensive as was made in the *Falbo*, *Estep*, *Smith*, *Dodez*, *Gibson*, *Sunal* and *Kulick* cases, the petitioners did not brief the matter as fully as was done in those cases. Now that the Court finally considered the point, which was not briefed as exhaustively as in those cases, and since, apparently, the Court has never heretofore considered the extensive arguments made in the other named cases, the petitioners shall here attempt to fully cover many of the points relied upon by the Court which were only sketchily briefed by them in their main brief. Therefore, the Court is respectfully requested to consider the material

which follows as though the Court were considering it for the first time in the main brief. It is necessary for the Court to thus consider the question and argument here made in order to afford the petitioners as complete and as fair a hearing as they would have received if they had fully briefed the question in their main brief. The petition will, as much as possible, be confined to calling to the attention of the Court matters which were apparently not noticed or considered by the Court in arriving at the decision rendered.

DISCUSSION

Although counsel for petitioners does not "give up", as stated by Mr. Justice Jackson in *Securities and Exchange Commission* v. *Chenery Corporation*, 67 S. Ct. 1575, 1760, yet concerning the controlling opinion, he now adopts as his language the words of Justice Jackson in that case: "Now I realize fully what Mark Twain meant when he said, 'The more you explain it, the more I don't understand it.'"

The requirement that a minister of religion who regularly and "customarily preaches and teaches the principles of religion of a recognized church" or a "duly ordained minister of religion" must not perform secular work and must devote all of his time to the ministry cannot be understood because such is contrary to history. It defies religious custom and practice. It flouts the express declarations of the National Director of Selective Service. It is without the support of any authority. It is wholly without support of reason, necessity or justice. It is contrary to the plain definition of the words used in the Act and Regulations as defined in a dictionary accessible to all. The interpretation is discriminatory.

The construction is unduly restrictive. Such a requirement emasculates entirely the very purpose of the exemption of ministers of religion. It must be conceded that the construction placed upon the Act is limited and narrow.

The Court did not place a liberal construction upon the Act and Regulations. The failure of the Court to place a liberal construction upon the exemption is a departure from former decisions of this Court holding that a broad and liberal interpretation should be placed upon exemptions under the taxation statutes in favor of religious, charitable and educational institutions. *Trinidad* v. *Sagrada Orden* etc., 263 U. S. 578; *Helvering* v. *Bliss*, 293 U. S. 144, Cf. *Better Business Bureau of Washington, D. C., Inc.* v. *United States*, 326 U. S. 279, 283. This Court has held that a Federal statute against the importation of foreign laborers into the country under contract should be construed so as to exempt from its provisions a clergyman called from England to officiate at the Trinity Church in New York. (*Holy Trinity Church* v. *United States*, 143 U. S. 457.

"Although we have no established church, yet we have not been wanting in that respect, nor niggardly of those provisions, which seem proper for the clergy of all religious denominations. It has not been our custom to require the services of clergymen in the offices of constables, overseers of the highways or of the poor, jurors or others, of a similar nature." *Guardians of the Poor* v. *Greene*, 5 Binn. (Pa.) 554.

It seems that the stingy construction placed on the Act by the Court in these cases is a plain departure from the spirit of American institutions as declared by this Court in *Watson* v. *Jones*, 13 Wall. (U. S.) 679. In this case the Court said: "The full and free right to entertain any religious belief, to practice any religious principle, and to teach any religious doctrine which does not violate the laws of morality and property and which does not infringe personal rights, is conceded to all. The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect." (13 Wall. at 728)

The basic error of the Court in this case is due to the restrictive, orthodox view of the members of the Court as to what constitutes a minister of religion. It was this same

misapprehension that led the Court into error in *Jones* v. *Opelika*, 316 U. S. 584. This erroneous decision was later reversed by this Court in *Jones* v. *Opelika*, 319 U. S. 103. See also the leading case overruling *Jones* v. *Opelika*, 316 U. S. 584, known as *Murdock* v. *Pennsylvania*, 319 U. S. 105. It is difficult to reconcile the decision of this Court in these cases and the decision of the Court in the case of *Murdock* v. *Pennsylvania*, *supra*. Since Jehovah's witnesses were recognized there as missionary evangelists doing ministerial work, having as high a claim to protection as the orthodox clergy preaching from the pulpit and engaged in preaching, then they should here also be found to be regarded under the Act as high as the clergy who "worship in the churches and [are] preaching from the pulpits." (*Murdock* v. *Pennsylvania*, 319 U. S. 105, 109.

Although he dissented in the case of *Murdock* v. *Commonwealth*, *supra*, Mr. Justice Reed later concurred in the decision of the Court and stated that the activity of Jehovah's witnesses is "immune from interference by the requirement of a license. . . . [¶] As I see no difference in respect to the exercise of religion between an itinerant distributor and one who remains in one general neighborhood or between one who is active part time and another who is active all of his time, there is no occasion for me to state again views already rejected by a majority of the Court. Consequently, I concur in the conclusion reached in the present case." *Follett* v. *Town of McCormick*, 321 U. S. 573, 578. It seems that the same opinion should consistently be applied here in order to avoid discrimination, which was escaped by the majority decision in *Murdock* v. *Pennsylvania*, 319 U. S. 105; *Follett* v. *Town of McCormick*, 321 U. S. 573.

"All proclaim that Christianity, general, tolerant Christianity, Christianity independent of sects and parties, that Christianity to which the sword and fagot are unknown, general tolerant Christianity, is the law of the land."

(*Works of Daniel Webster*, vol. 6, p. 176; 10 Mich. Law Rev. 176) It should be remembered that this Court, in *Holy Trinity Church v. United States*, 143 U. S. 457, declared that the United States is a Christian nation. Thus, it does violence to that statement to presume that the Congress of the United States intended to outlaw Christian ministers by restricting the exemption to only orthodox clergy. The restrictive interpretation the Court has placed upon the Regulations would outlaw completely primitive Christianity as practiced by Jesus and his apostles. The restrictive construction of the Act would exclude Jesus and his apostles from the exemption provided for by Congress, if they were on earth in the flesh today. They would find that they would have no relief by this Court against the Sanhedrin views of an arbitrary draft board. Paul regularly performed, secular work during his entire ministry. He spent much time in tent making, so as to earn money and thus avoid being a charge upon those to whom he preached. (1 Thess. 4:10-12; 2 Thess. 3:7-17) He likewise taught the people publicly and from house to house. (Acts 20:20) Peter and several apostles were fishermen, while regularly and customarily performing their duties as apostles. (Matt. 4:18-21; Mark 1:16, 19; John 21:2, 3) Luke was a physician. (Col. 4:14) Jesus was a carpenter. (Mark 6:3) Jesus, as well as all of His apostles, was accused of being unlearned and ignorant. (Acts 4:13; John 7:15) The scribes and Pharisees, who were members of the Sanhedrin Court, an administrative body, conspired to wipe out Jesus and His apostles by finding they were not ministers.

The ministers of the "sect of the Nazarene" were not regarded as ministers by that orthodox administrative agency in their day. This was due primarily to their unorthodoxy and their unpopularity. They preached from house to house and publicly upon the streets, which was contrary to the orthodox method employed by the elders,

the scribes and Pharisees, that presided in the temples. (Acts 20:20)

The restrictive interpretation placed upon the Act and Regulations should be revoked and a more liberal one adopted. This is necessary so as to avoid discrimination against the petitioners who are modern-day followers of Christ Jesus, engaged in primitive preaching of the same gospel in the same manner as did he and his apostles.

The pages of history abound with proof that even ministers of orthodox denominations perform secular work during the week in order to sustain themselves in their ministry. Today some denominations have no paid clergy at all. Every minister in some denominations is required to perform secular work, although he may regularly and customarily teach and preach the doctrines and principles of his church as a minister. "Upon this point a page of history is worth a volume of logic."—Mr. Justice Holmes, *N. Y. Trust Company* v. *Eisner*, 256 U. S. 345, 349.

The Court has ignored entirely the Golden Rule in determining the construction to be placed on the statute. Surely the Court would have the members of the ministry treated in the same manner as they would have the members of the judiciary treated. In other words, the members of the Court undoubtedly believe in doing unto others as they would have others do unto them. Members of the judiciary are deferred by the Act. Members of the ministry are by the Act exempt. The performance of secular work or dependence upon income from activity other than the ministry is not mentioned in the Statute or Regulations, as far as the minister is concerned. Also nothing is said in the Act or Regulations about the amount of time that a regular minister should devote to his work. Nothing is said in the Act which would require that judges have no extra-judicial activity. Nothing is said in the Act that judges are precluded from earning money from sources other than their positions on the bench. However, the unreasonable and arbitrary

construction placed upon the Act by the Court in these cases, which denies a minister the right to exemption because he performs secular work in addition to regular performance of duties as a minister would, by force of the same reason, also require that a judge be denied the exemption because he did some extra-judicial work in addition to his duties as a judge. Such a conclusion, although logically drawn from the opinion of the Court in these cases, is obviously contrary to the Act and Regulations.

The conclusion of the Court that the performance of secular work and the imposition of orthodox standards in determining whether or not Jehovah's witnesses are entitled to the exemption under the Act is contrary to the administrative interpretation placed upon the Act by the Director. The policy of the Director from the inception of the Act and Regulations to the termination of the Act is expressed in State Director Advice No. 213-B, issued on June 7, 1944. In this Advice all former opinions in reference to religious organizations recognized under the Act, including Jehovah's witnesses, were consolidated. In that Advice the Director said, *inter alia:*

"Part III . . .

"2. It is the opinion of National Headquarters that the question of *the regular discharge of his duties as a minister* is a most important factor in determining whether a registrant should be classified in Class IV-D in accordance with the provisions of paragraphs (b) and (c) of section 622.44 of the Regulations. (Emphasis added)

"3. *The historic nature of the ministerial function of a registrant's own religious organization must be taken into consideration in each individual case. In some churches both practice and necessity require the minister to support himself, either partially or wholly, by secular work.*" (Emphasis added)

The liberal construction placed upon the Act so as not to confine solely to the orthodox clergy is demonstrated

by the fact that officers of the Salvation Army, Lay Brethren of the Catholic Church, the practitioners, readers and lecturers of Christian Science in the Church of Christ Scientist, canters in the Jewish congregation, counselors of the Mormon Church, and colporteurs of the Seventh-Day Adventist Church were all declared by General Hershey to be exempt.

The narrow, restrictive and orthodox determination by the Court in these cases would also exclude entirely those persons above mentioned who were included within the exemption by the Director. The construction of the Act so as to exclude Jehovah's witnesses discriminates against them without cause, justice or reason.

The Court says, "We confine ourselves to the facts appearing in the Selective Service files of the three petitioners, although the only documents dealing with the petitioners' status as ministers were submitted by petitioners themselves." (Slip Opinion, p. 9) In discussing the facts on this petition for rehearing the petitioners likewise will confine themselves to the facts appearing in the Selective Service files. An examination of the files will demonstrate that each petitioner brought himself within the definition of a minister of religion according to orthodox views and to the administrative interpretation put upon the Act and Regulations by the National Headquarters of the Selective Service System.

As to Cox, there is not one iota of evidence in his file showing that at the time of his final classification he was not engaged in the ministry full time. It is true that on October 16, 1940, when he registered, he showed that he was a truck driver, having been such since 1936. It was not until March 20, 1942, that he showed he had become one of Jehovah's witnesses in January 1942. This appeared in the Conscientious Objector's form, which showed that he had been witnessing or preaching since January, 1942. The affidavits and certificates appearing in the draft board

file of Cox showed that beginning October 16, 1942, he had been engaged full time in the ministry and was able to average 150 hours per month in the performance of his ministerial, missionary and evangelist duties. There is no dispute of this uncontradicted, documentary evidence.

The Court intimates that it might have been possible to dispute such documentary evidence. Just how the Court provides no enlightenment, but leaves us to speculate. Although the Court says that no *de novo* evidence can be received upon the trial and holds that the determination is to be confined to the draft board record, the Court nevertheless says, "No evidence was introduced showing the total amount of time Cox had spent in religious activities since October 16, 1942. Nor was there evidence of the secular activities of Cox nor the time employed in them." (Slip Opinion, p. 3)

It should be quite obvious to any reasonable person that if Cox committed perjury in his affidavit filed with the board, showing that he was averaging 150 hours per month to "my ministerial duties without secular work" that the draft board would have so accused him and made a memorandum thereof which would appear in the file. Also, if Cox was lying, as the Court intimates, then certain it is the District Attorney would have questioned Cox about the truthfulness of his statement, "my entire time will be devoted to preaching the Gospel as a pioneer" and "I was able to average 150 hours per month to my ministerial duties without secular work." The very fact that neither the draft board nor the Government upon the trial questioned the statement of Cox appearing in his affidavit should convince a fair-minded person that his statements were true. Especially is this so in view of the ordination certificate of the Watchtower Bible and Tract Society, Inc., certifying that his "entire time" was devoted to missionary work as an ordained minister of the Gospel. It is hardly fair for the Court at this late date—considering the failure of the

board to raise it, or the Government to cross-examine Cox about it, or the trial court to even inquire about the matter upon his trial—to assert that the documents "do not prove that Cox spent full time as a 'pioneer' between October, 1942 and May, 1944." (Slip Opinion, p. 9)

It seems that, before the Court would undertake to intimate that a minister and his religious organization had not told the truth, the Court, because of the failure of the district court to inquire into it, would have remanded this question to the district court for a new trial to ascertain whether or not perjury had been committed.

The Court says, "As he made claim of conscientious objector classification only after he was reclassified I-A from IV-F and still later claimed ministerial exemption, the board was justified in deciding from the available facts that Cox had not established his ministerial status." (Slip Opinion, p. 9) This is a remarkable conclusion. The tentative class "I" given Cox on December 4, 1940, which was subject to a physical examination, was changed on January 31, 1941, to class IV-F, meaning that he was physically unfit for service, that continued to March 10, 1942, when he was reclassified in I-A. There certainly was no occasion for him to claim conscientious objector classification during the time that he was classified as physically unfit. Moreover a conscientious objector classification would of necessity have resulted in his being classified as liable for work in a C.P.S. camp. The facts giving rise to his claim for exemption as a minister did not occur until January, 1942. This was a change in status. On March 20, 1942, after the draft board disturbed his physically-unfit classification, he promptly made known the facts to the board. He could not have notified the board before January. The delay of slightly over one month is not such gross laches as to raise the inference that he lied when he finally supplied the board with information.

It is truly remarkable that the veracity of a registrant should be questioned by the Court because the registrant

attempted to comply with the Regulations and informed the board of facts in respect to his change of status. The Regulations required the registrant to keep the board informed of any facts pertaining to change of status. (See Sec. 626.1 of the Regulations.) It is a new theory in the law to hold that the compliance with that regulation would be grounds for denial of the claim for exemption. If this new theory manufactured by the Court is to be allowed to stand, then notification of every change of status to a board which resulted in exemption would make the exemption *ipso facto* invalid. This theory nullifies entirely the spirit of the Regulations that require a registrant to be classified according to his status at the time he is ordered to report.

The Court says, "The Board might have reasonably held that nothing less than definite evidence of his full devotion of his available time to religious leadership would suffice under these circumstances." (Slip Opinion, p. 9) What could be more definite evidence than a sworn affidavit and a certificate of the recognized religious organization backing up Cox in his claim for exemption? It is quite hard to understand how the Court can say that the board might have held that this was not definite evidence when the record wholly fails to show that the board specifically found that this was not definite evidence. Especially is this true in view of the fact that the Government on the trial in the District Court did not prove that the board did not consider this documentary evidence "definite evidence". This conclusion of the Court certainly nullifies all principles of criminal jurisprudence. The petitioner Cox was presumed to be innocent. The presumption of the regularity of the administrative proceedings does not overcome this presumption. The fantastic inference of the Court flies in the teeth of the record and the presumption of innocence. Cox has been convicted because of the Court's reading between the lines an impeachment of sworn documentary evidence. This is truly an innovation in criminal jurisprudence.

The Court advocates that the draft boards have the right to ignore the undisputed evidence in arriving at classifications. Indeed, the Court argues that the Selective Service System may reject unimpeached written statements and affidavits of persons acquainted with Jehovah's witnesses who make claims for exemption as ministers of religion before draft boards, and render decisions directly contrary to the unimpeached record.

This theory for the undue assumption of power by the draft boards, adopted by the Court, gives the boards greater powers than any other agency ever created by law. Even judges and juries do not have the right to reject undisputed evidence. To reject undisputed evidence is a violation of the right of due process. A decision by the draft board in the teeth of the evidence is dishonest. A dishonest decision is arbitrary and capricious. An arbitrary and capricious decision, contrary to the evidence, is unlawful and void. *Johnson* v. *United States* (CCA-8) 126 F. 2d 242, 247. "If it flies in the teeth of the facts which are before it, then its action is arbitrary and the registrant has not been afforded due process of law." SWYGERT, J., *Hull* v. *Stalter*, 61 F. Supp. 732.

In State Director Advice No. 213-B, issued by the National Director of Selective Service, concerning the consideration of evidence submitted by ministers to local boards, the Director instructed the boards that "In view of the fact that the exemption of regular or duly ordained ministers of religion is a statutory provision of the Act, no particular form of document is specified for the presentation of information concerning such status." (Part III, Par. 4)

If the draft boards are allowed to arrogate to themselves such extraodinary power accorded them by the Court, then no person would ever be able to establish any claim contrary to the whims and caprices of the members of the draft boards and the Selective Service System. Even a judge

who claimed deferment under the Act could be denied his claim for deferment from military training because the boards would have the authority to reject his written evidence proving his status as a judge of a court of record. If arbitrary and capricious draft boards have this power, then indeed they have been authorized by Congress to repeal the parts of the Act allowing deferment to members of Congress, members of State legislatures and the Governors of the various states.

It seems only reasonable to conclude that no draft board has the power to arbitrarily and capriciously reject undisputed written evidence and render a decision contrary thereto. Especially is this true in the cases where the written evidence submitted to the board is undisputed. The power of the draft boards to reject written proof is confined only to instances where it is positively and expressly established that the evidence is unreliable, false, discredited or impeached.

Determination of draft boards contrary to the undisputed evidence must be supported by some evidence. If a determination is made upon some grounds contrary to evidence received, the Regulations provide that the evidence relied upon by the board should be reduced to writing and placed in the registrant's file. (Reg. 627.13 (b)) This is absolutely necessary in order to preserve due process and the rights of the registrant upon appeal. Moreover, it is imperative that the draft boards make a record of the evidence they rely upon that does not appear in the file, in order that the board of appeal can properly perform its function in reviewing the determination upon appeal. How can a board of appeal or a Court properly pass upon the validity of a classification unless it has advantage of the same evidence that a draft board has? The courts and boards of appeal can consider only that which is reduced to writing. (Regs. 615.43, 627.13) It is mandatory that the boards reduce the evidence of perjury or impeachment to

writing in order that the file forwarded to the board of appeal, which classifies the registrant *de novo,* may be complete. (Regs. 615.43, 627.13) Congress did not intend to give unlimited power to a draft board nor authorize it to reject undisputed evidence and arbitrarily and capriciously classify the registrant according to caprice or rumors, hearsay or other incompetent evidence.

Petitioners have previously referred to the statement of the Court, "No evidence was introduced showing the total amount of time Cox had spent in religious activities since October 16, 1942. Nor was there evidence of the secular activities of Cox nor the time employed in them." (Slip Opinion, p. 3) It is quite obvious that after October 16, 1942, he had no secular activities. This was established by the undisputed documents appearing in the draft board file. There certainly was undisputed evidence showing "the total amount of time Cox had spent in religious activities since October 16, 1942." The documents plainly showed that he spent 150 hours per month. In the absence of any impeachment of this by the Government, it is highly indecorous for the Court, examining the record *de novo* and giving him a jury trial for the first time in these proceedings, to question or impeach the undisputed evidence appearing in the record. While Cox may have had secular employment from January to October, 1942, certain it is there is no evidence that he had any secular employment after October, 1942.

It was not what his status was prior to or at the time of his registration that determined his rights under the Act and Regulations. It was what his occupation and status was on the date of the final classification that determines the legality of the action of the board. This would also apply to the objection made that Cox did not become a pioneer or full-time minister until after he was classified I-A. The fact is that he was a full-time pioneer minister devoting 150 hours per month to his ministry at all times since Oc-

tober, 1942. It was his status at and since October, 1942, and on the date of the final classification that really counts.

In the case *United States* ex rel. *Hull* v. *Stalter* (CCA-7) 151 F.2d 633, the same facts were urged by the Government. There it was contended that Hull had full-time secular work until after he filed his questionnaire, following his registration. Moreover, it was urged that he did not go into the full-time ministry until after he saw he was about to be drafted. Also it was contended, as the Court contends in these cases, that Hull did not have his name on a list. The court found that it was the status of the registrant at the time of the final classification rather than at the time of registration that determined the validity of the order. In that case the court said:

"We see no reason why a registrant with a non-exempt status at the time of registration should not subsequently be permitted to show that his status has changed or, conversely, why one who is exempt at the time of registration should not afterwards be shown to be non-exempt. . . . The point perhaps is better illustrated by referring to certain officials who are deferred from military service while holding office. Suppose a registrant who held no office at the time of his registration and was therefore liable for military service should subsequently be elected or appointed judge of a court or any other office mentioned in the Act. We suppose it would not be seriously contended but that he would be permitted to show his changed status any time prior to his induction into service and therefore be entitled to deferment. And we see no reason why a registrant claiming to be exempt as a minister should not be classified according to his status at the time of his final classification rather than at the time of registration."

The petitioner Cox came clearly under the definition of what constitutes a minister of religion within the meaning of the Act. The documentary evidence, which was undisputed, appearing in the draft board file brought him within

the narrow view of this Court and Opinion No. 14 relied upon by this Court. "We agree, also, that Opinion 14 furnishes a proper guide to the interpretation of the Act and Regulations." (Slip Opinion, p. 9)

The undisputed evidence showed that Cox devoted "all or substantially all of" his time "to the work of teaching the tenets of" his religion. The record showed that he did "devote" his life "in the furtherance of the beliefs of Jehovah's witnesses." It was shown that he "performed functions which are normally performed by regular or duly ordained ministers of other religions." The draft board file showed that Cox was "regarded by other Jehovah's witnesses in the same manner in which regular or duly ordained ministers of other religions are ordinarily regarded."

The undisputed evidence showed that all of his time at the time of his final classification was devoted to regularly and customarily teaching and preaching the doctrines and principles of Jehovah's witnesses. This conclusion that Cox is a minister of religion is supported by the definition of that term by the administrative interpretations of the National Headquarters of the Selective Service System. In his letter of July 15, 1946, printed by petitioner as an appendix to his brief in *Alexander* v. *Kulick*, No. 240 Oct. Term, Major Wherry for General Hershey, the Director of Selective Service, concerning pioneers who devote 150 or more hours per month to the missionary activity of Jehovah's witnesses, said, among other things:

"Other members of Jehovah's witnesses may be judged also by either of these standards. However, it would appear that most of them must be judged on the basis of the extent to which they have devoted their lives to the work of your church. Regarding this we have set no standard number of hours in religious work as a standard, although you have stated to us that a 'Pioneer is required to devote a specified minimum of 150 hours per month to his ministerial duties.' You have also told us that 'there are also a number of

special pioneers. These are required to devote 175 hours per month to their work . . . . . .

"As we have stated hereinbefore, we have not accepted your specified number of hours of work for a Pioneer as a standard of work for a member of the minor clergy. But where one of your men fails in meeting that quota, for reasons other than sickness, we feel that no good reason exists for us to take action with a view of procuring a IV-D classification for the man. Accordingly, we informed you that no further action was contemplated in this case. . . ." See also the large number of cases determined by National Headquarters listed in the Appendix to the joint brief for respondent Kulick and petitioner Sunal in *Alexander* v. *Kulick*, No. 840, October Term, 1946, at pages 1-32.

A recent case directly in point is that of *Louis Dabney Smith* v. *United States*. Smith, who became a full-time pioneer after his classification of I-A by the local board, appealed to the board of appeal and to the President claiming exemption as a minister of religion, that is, a IV-D classification. The Court of Appeals for the Fourth Circuit twice held that the classification of Smith was not arbitrary and capricious and that he was properly denied his claim for exemption. (*See Smith* v. *United States*, CCA-4, 148 F. 2d 288; *Smith* v. *United States*, CCA-4, 157 F. 2d 176) After the cause was remanded and the case was pending in the District Court the file in the *Smith* case, presenting facts much weaker than the *Cox* case, was submitted to the National Director of Selective Service again for review. The Director was asked to advise the Attorney General to dismiss the prosecution in the *Smith* case. He did so direct the Attorney General. Recently, on November 5, 1947, the Attorney General moved for dismissal of the indictment, which was granted by the District Court.[1] The opinion of the

[1] It should be here observed that the Government moved for dismissal of the indictments in *United States* v. *Estep*, *United States* v. *Gibson*, and *United States* v. *Dodez*.

National Director after review of the *Smith* case, is an authoritative interpretation of the Regulations, which should be applied in the *Cox* case. The letter of the Director to the Attorney General is set forth here:

NATIONAL HEADQUARTERS
SELECTIVE SERVICE SYSTEM
Washington 25, D.C.

March 7, 1947

3-164-1

The Honorable

The Attorney General

Subject: Louis Dabney Smith
Order No. 14022
Richmond County Local Board No. 68
Columbia, South Carolina

My dear Mr. Attorney General:

We understand that the case of the above-named man has been sent back to the district court for rehearing.

Because of representations which have been made to this Headquarters we have given special consideration to this man's case. We have read much of the court records in the case and note that it has been asserted that this man had actually ceased all secular employment and was engaged full time in religious and ministerial duties for some time before he was ordered to report for induction. Such facts were not reflected by the registrant's file when the case was on appeal to the President shortly before the time he was ordered to report for induction. However, if such facts are true and if information reflecting these facts was contained in his local board file at the time he was ordered to report for induction we feel that he should have been

classified in Class IV-D and exempt from training and service as a minister of religion.

It is suggested that you take these matters into consideration in determining whether the man's case should be returned to the local board of jurisdiction for further classification action.

Sincerely yours,

(s) Lewis B. Hershey
DIRECTOR

The Seventh-Day Adventist Church colporteurs who are engaged in mere distribution of books from place to place and door to door were declared to be exempt. It is said: "Members of this church consider their colporteur evangelistic work to be of highest importance in the propagation of the faith. They look upon the men who do this work as engaged in a vocation comparable to the gospel ministry, even though they are not ordained." (State Director Advice No. 213-B, Part IV, Par. 10)

It is submitted, therefore, that there was absolutely no basis in fact whatever for the determination of the board of appeal that Cox was not a minister of religion, regularly and customarily teaching and preaching the doctrines and principles of Jehovah's witnesses and exempt from all training and service. The record showed that he devoted substantially all of his time to the ministry.

In respect to the *Thompson* and *Roisum* cases, the facts as stated by the controlling opinion of the Court are accepted, except for one omission in the statement concerning Roisum. The draft board record shows that prior to the final determination by the board of appeal there was an extensive hearing and examination of petitioner Roisum by a hearing officer of the Department of Justice. This officer reduced to writing a summary of the testimony taken from Roisum, and incorporated in his report was the summary

of an investigation among the neighbors of Roisum. In his report the hearing officer stated that there was no question as to the sincerity of Roisum and that substantially all of Roisum's time was devoted to the furtherance of his preaching activity as a minister. But also upon the facts appearing in the draft board files received in evidence on the trials of the *Thompson* and *Roisum* cases it appears that each comes clearly within the definition of an orthodox minister of religion. According to the draft board records they were "regular or duly ordained ministers of religion", as those terms have been defined by the National Director of Selective Service. It should be observed that the Court overlooked entirely that Thompson and Roisum stood in relation to the congregations of Jehovah's witnesses with which they were associated as do the orthodox ministers of the popularly recognized religions. Apparently the Court assumed, contrary to the facts, that Thompson and Roisum did not perform duties similar to those performed by the ministers of orthodox churches. The records irrefutably established that Thompson and Roisum occupied the same high position in reference to the congregations of Jehovah's witnesses as do the orthodox clergy. The records in their cases show, contrary to the statement of the Court, that they did occupy "leadership in church activities" and that they had dedicated "their lives to the furtherance of religious work . . . " (Slip Opinion, p. 9)

The draft board files of Thompson and Roisum show that in addition to the performance of the door-to-door missionary-evangelistic work, each was an "assistant company servant". The record showed that Thompson was a school instructor in the "Course in Theocratic Ministry". Thompson also showed that he was "advertising servant" and "book study conductor". In addition to occupying the position as a pioneer and assistant company servant, Roisum was also "back call servant" and "book study conductor". The affidavits filed by Thompson and Roisum undisputably

showed they were leaders of the congregations of Jehovah's witnesses with which they were associated. Their position as assistant company servant, advertising servant, back call servant and book study conductor caused each to be regarded "leaders" by other Jehovah's witnesses which is in the same manner that the orthodox clergy are regarded by their congregation.

The National Headquarters of Selective Service has accepted the recognition by the Watchtower Bible and Tract Society of its company servants (presiding ministers of congregations), assistant company servants (assistant presiding ministers of congregations) and other servants in the congregation as proof that such servants occupy positions in the congregations of Jehovah's witnesses as are occupied by the orthodox clergy. In an administrative interpretation placed upon the Regulations by the National Director of Selective Service, expressed in his letter of July 15, 1946, printed by the petitioner in *Alexander* v. *Kulick*, No. 840, Oct. Term 1946, as an exhibit to the petitioner's brief, concerning Jehovah's witnesses, the Director said, *inter alia*, that "whether an official of the Jehovah's witnesses is to be recognized as a regular or duly ordained minister must be determined in each individual case based not only upon whether he is regarded by other Jehovah's witnesses as a minister of religion but also upon whether he performs functions which are those generally recognized as religious and ministerial functions normally performed by regular or duly ordained ministers of religion and the extent to which he devotes his life to the furtherance of your beliefs. . . .

"From this information we have gained the impression that many of your Company Servants and Servants to the Brethren hold positions of considerable religious leadership within the organization. We have felt that the demonstration of this leadership may qualify a man to be considered a minister of religion by Selective Service . . . This

has been done without regard to the question of the registrant's having been engaged in certain secular employment.

"We mention this because it appears that you feel undue consideration has been given by Selective Service to the secular employment engaged in by certain Jehovah's witnesses. We emphasize the fact that in our opinion the controlling factor in the final analysis of any case wherein a man claims to be a minister is the question of his ministerial work and not that of his secular employment. However, information indicating that a man who claims to be a minister is engaged in secular employment may raise a question regarding the extent that secular employment crowds out and precludes ministerial activities. . . .

"If the man demonstrates through his religious and ministerial work that he holds a position of leadership in your church and that his exemption 'is necessary to protect the church' or if the man demonstrates that he has consecrated his life to religious service, we feel that he is entitled to classification in Class IV-D and exemption from training and service."

Both Thompson and Roisum demonstrated that they held positions of leadership in Jehovah's witnesses as expressed by the National Director of Selective Service in the letter above referred to. If the mere devoting of two hours per week or even forty hours per week to secular work would justify the denying of an exempt classification to petitioners then all of the exempt persons and deferred persons under the Act would be in a very insecure position. It is not the incidental work that petitioners did on the side to earn a living that determined their right to the exemption. It was whether they had regularly and faithfully discharged their duties as minister missionary evangelists that settled the matter. The undisputed evidence and the record show that they were at all times faithfully preaching regularly and customarily. It is a distortion of the record to say that the hours per week devoted to secular work to earn

a living prevented them from doing their ministry. Even forty hours per week devoted to such work would not and did not affect their ministry status. The performance of secular work was wholly immaterial to their ministerial status. Their vocation was that of missionary evangelists. It has never changed since the date of their being classified. Their avocation was secular work when not engaged in ministry duties. The contention made by the Court concerning the time spent in their ministry places an arbitrary construction upon section 5 (d) of the Act so as to result in injustices. Such makes a mockery out of the law and leads to unreasonable results. There is no evidence that they pursued the ministry as an avocation. It was their life-time work and occupation and they were entitled to pursue it.

The fact that Thompson and Roisum performed secular work in no way interfered with or prevented them from performing their duties as ministers of religion. The source of financial revenue of persons excused by the Act from the performance of training and service is wholly irrelevant and immaterial to the exemption and deferment granted by Congress.

The fact that a judge of a court may reside on a farm or ranch and/or operate it during his term of office in no way affects the statutory deferment as long as he fills the office of a judge. The fact that a governor of a state may own and operate some commercial business in no way weakens his claim for deferment under the Act. That a congressman may maintain a law office and carry on a lucrative practice while serving in the Congress in no way estops him from claiming the deferment granted by the Act. That a wealthy clergyman may devote all of his spare time to the caring of investments in bonds, stocks, real estate and other enterprises in no way deprives him of his right to claim exemption under the Act as long as he is recognized by his organization as a minister of religion

and teaches and preaches regularly the doctrines and principles of a recognized religious organization.

The mere fact that a poor preacher of a financially weak congregation is required to perform secular work during the week to support himself in the ministry does not bar him from claiming the exemption as a minister of religion as long as he regularly and customarily teaches and preaches the doctrines and principles of a recognized religious organization. In determining whether or not there is basis in fact for a draft board determination denying a claim for exemption or deferment under the Act cannot be supported solely by a finding that such person had other activities on the side that would not, within themselves, entitle such person to exemption or deferment. If the facts establish that such person comes within the exemption or deferment granted under the Act, incidental activities not entitling him to exemption or deferment are wholly irrelevant and immaterial.

Denial of exemption or deferment upon these irrelevant and immaterial considerations is undoubtedly contrary to law, arbitrary and capricious and without basis in fact, thus establishing that the order denying the claim is in excess of the jurisdiction of the draft board. The error and trap into which the Court, as well as the lower courts, have fallen in these cases, is the result of pursuing these very irrelevant and immaterial considerations.

There is nothing in the terms of the Act indicating that the Congress intended to restrict the terms "regular minister of religion" or "ordained minister of religion". Indeed the records of the deliberations of the Congress indicate that it was the intention of the lawmakers to give the same broad definition to such terms as have been given by the whole people of the nation since the days of the first settlers of the country. That construction is a broad and liberal one so as to avoid discrimination.

The "Senate Committee on military affairs worked out

an amendment to the Burke-Wadsworth bill deferring the military training of certain groups, ministers and others. The amendment was not satisfactory to all the churches. On August 12 I submitted amendments which do have their approval. . . . In presenting this amendment to the Senate I assume that those persons charged with the administration of this Act will give to religion its proper place in a democratic form of government, and to this end will adopt such rules and regulations as will embody the accepted definitions of the terms 'regular or duly ordained ministers of religion' as those terms are meant within this amendment. . . . A regular minister of religion, as used in my amendment, should mean a person who as his customary vocation preaches and teaches the principles of a religion, of a church, a religious sect, or organization of which he is a member, without having been formally ordained as a minister of religion, and who is recognized by such church, sect, or organization as a regular minister." (Senator Johnson of Colorado, 86 Cong. Rec. 10293, 10294. Cf. 86 Cong. Rec. 10095.)

The greatest part of the discussions in the deliberations of the Congress during consideration of the Burke-Wadsworth Bill insofar as they pertained to ministers and students preparing for the ministry were devoted almost exclusively to students preparing for the ministry. There is no question that it was definitely intended that students preparing for the ministry were considered by some of the Senators who discussed the matter as exempt only when they were engaged full time in the study. In other words, it was intended that the student preparing for the ministry should be a full-time student. There was nothing in the Act to indicate that if he worked at odd jobs to maintain himself in his schooling he would be denied his claim for exemption. The only requirement was that he be a full-time student and no more was demanded. Senator Walsh said, in his discussions of the provision for the exemption of

ministers, that "ministers of the gospel and actual students who are engaged in giving all their time in preparation for religious work should be exempted." (86 Cong. Rec. 10502) Mr. Connally asked: "The bill exempts all ministers actively engaged in their duties. Is that correct? Mr. Walsh: Yes." (86 Cong. Rec. 10505)

It seems to be the emphatic opinion of at least one Senator that it was not necessary that a minister of the gospel should have attended a divinity school as a condition precedent to becoming a minister of the gospel. Mr. Connally said: "Mr. President, when I was a boy none of the preachers whom I ever heard preach could have taken the benefit of that exemption [students preparing for the ministry]. Many good old cornfield preachers who gathered their flocks around an open Bible on Sunday morning or gathered their flocks in camp meeting in the summertime, and got more converts during those two weeks than they got all the year, because next year they would get all those converts over again and then some new ones, never saw a divinity school. They never were in a seminary; but they walked with their God out yonder amidst the forests and plains; they read His book at night by kerosene lamp or tallow candle." (86 Cong. Rec. 10589-10590)

It was said that the provision for exemption of ministers in the Burke-Wadsworth Bill was the same as the provision which appeared in the 1917 Act. (86 Cong. Rec. 10293) The provisions of the 1917 Act while being considered by the members of the Congress were held to extend to regular ministers as well as the ordained clergy. It was provided that regular ministers, those not ordained as the clergy, should receive the same treatment as the ordained clergy received. (55 Cong. Rec. 1527, 1528) It was said that a regular minister "would mean a man whose calling is the preaching of the gospel and who follows that calling for a life work." (55 Cong. Rec. 1528)

The history of the discussions in the Congress shows

no intention to limit the intepretation of the term in the manner as the Government would have it limited. Indeed Senator McKellar considered that a lay preacher was exempted under the 1917 Act. He said: "I think it will be conceded by all the record of Sgt. Alvin York overtopped and overreached the record of any other plain soldier who went into the American Army. Sergeant York was a lay minister. At the time the draft was put into operation he was urged by his friends, he was urged by his own conscience, by his own belief in peace, and by his own horror of war to ask for an exemption from the army because he was a minister of a church. After careful consideration, he concluded not to ask for exemption, . . ."

The Director of Selective Service has said that in Congress there was "a natural repugnance toward any proposals for drafting ministers of religion for training and Service." *Selective Service in Wartime*, Second Report of Director of Selective Service 1941-42, p. 239.

In order to give the Act and Regulations the broad interpretation contended for here, it is not necessary for the court to strain the language of the Act and Regulations. Indeed, all that has to be done is to put a reasonable interpretation upon the language of the Act and Regulations in the light of history.

The Act provides: "Regular or duly ordained ministers of religion and students who are preparing for the ministry . . . shall be exempt from training and service (but not from registration) under this Act." (Selective Training and Service Act, 54 Stat. 887, 50 U. S. C. App. § 305 (d))

The Regulations define a *regular minister of religion* to be "a man who customarily preaches and teaches the principles of religion of a recognized church, religious sect, or religious organization of which he is a member, without having been formally ordained as a minister of religion; and who is recognized by such church, sect, or organization as a minister." (Reg. 622.44 (b))

"A 'duly ordained minister of religion' is a man who has been ordained in accordance with the ceremonial ritual or discipline of a recognized church, religious sect, or religious organization, to teach and preach its doctrines and to administer its rites and ceremonies in public worship; and who customarily performs those duties." (Reg. 622.44 (c))

These definitions do not say that the minister must be a member of an orthodox denomination. They do not exclude any member of any dissentient organization.

It is quite apparent that the Congress, in enacting the Selective Training and Service Act of 1940, did not intend to discriminate. It intended that the provisions of the exemption provision for ministers of religion should extend to all ministers of all denominations. There can be no question that the Congress intended to put upon the terms "regular minister of religion" and "ordained minister of religion" the same broad and commonly accepted definition that has been placed upon the terms in common parlance and in history of the ministry of the gospel in this country. Congress did not intend to limit the beneficent provisions of the exemption in the Act to any particular class of clergy or ministers. They intended to be fair to all. Since the Congress did not limit or restrict the definitions of the terms it is proper to consider what the terms have meant to the people in light of history and of other situations similar to that presented in these two cases.

The term "regular minister" is used in the Regulations. The term "regular minister" has been defined to be one who regularly teaches and preaches. It has been held that the fact that a minister of religion may be performing secular work during the week to support himself and rendering his ministerial services gratuitously did not prevent him from being a regular minister of religion, because he preached regularly each week, and was therefore a regular minister of religion. Ex parte *Cain*, 39 Ala. 440-441.

It is to be observed that the Regulations use the word

"customarily". *Customary,* the word from which it is derived, is synonymous to "usual" and "habitual". It does not mean *continuously.* It is not synonymous with *continuously, uninterruptedly, daily, hourly,* or *momentarily.* The Century Dictionary defines "customarily" to mean "in a customary manner; commonly; habitually". Therefore the use of the words "regular" and "customarily" implies that Congress intended to give the term "minister of religion" the same broad scope which it has included throughout the history of freedom of worship in this country.

From time immemorial the work of a preacher or minister has not been confined to speaking from a pulpit to a congregation that is capable of supporting the minister financially so as to make it unnecessary for him to depend on other sources for support and maintenance. In fact, ministers more often than not, especially in the rural sections, have been forced to work on farms, in grocery stores, and at other secular work during six days of the week in order to support themselves and their families, so that they might regularly and customarily preach on Sunday. It is a part of the custom of this country that preaching is done regularly when done on Sunday. As long as a minister preaches regularly on Sunday and at night times during the week he is regularly and customarily preaching. If he regularly and customarily preaches during the week, he is a regular minister of religion under the Act and Regulations. The source of his income is wholly immaterial. Whether his congregation is able to provide him with an income sufficient to maintain himself is immaterial. Whether he is fortunate in being rich and able to maintain himself from stocks, bonds, securities and property investments is not material. Whether the regular minister, like most ministers, is not financially independent, but has to depend on his labors for his support is also immaterial. Time spent in attending to investments from which an income is derived, or to labor in secular callings, is also immaterial in

determining whether or not the minister regularly and customarily teaches and preaches.

In the general instructions concerning ministers of religion issued by the National Headquarters of the Selective Service System it is stated that the "historic nature of the ministerial function of a registrant's own religious organization must be taken into consideration in each individual case." (State Director Advice Number 213-B, Part III, Par. 3, Issued June 7, 1944.)[2] In the case of Jehovah's witnesses the historic nature of their missionary evangelistic society whereby every one must be a duly trained and equipped minister of religion regularly engaged in preaching as a missionary evangelist was almost uniformly ignored. The historic nature of the ministerial functions of other religious organizations was imposed in many cases so as to exclude Jehovah's witnesses from their claim for exemption.

The Director provided for the benefit of all religious organizations except Jehovah's witnesses the wise and generous provision that in "some religious organizations both practice and necessity require the minister to support himself, either partially or wholly, by secular work." (*Ibid.*) In the case of Jehovah's witnesses it was directed that the eligibility of one of Jehovah's witnesses depended on whether "he devotes his life in the furtherance of the beliefs of Jehovah's witnesses". (*Ibid.*, Part IV, Paragraph 3). This was generally construed so as to deny Jehovah's witnesses engaged regularly in preaching the gospel as missionaries each week who supported "himself, either partially or wholly, by secular work."

In the case of Jehovah's witnesses it was required that

[2] Amended September 25, 1944. It incorporates the provisions of Opinion No. 14 of Volume III of National Headquarters Selective Service System Opinions concerning Jehovah's witnesses dated June 14, 1941.

they file a list of their full-time missionary evangelists known as pioneers. This list was frozen in 1942 and no names could be added to it. It was only the full-time missionary evangelists whose names were on this list that the National Headquarters declared to be entitled to consideration as ministers of religion. (*Ibid.*, Part IV, Paragraph 3) All bona fide full-time pioneer Jehovah's witnesses whose names did not appear on the list certified to by National Headquarters of the Selective Service System were eligible for consideration as ministers of religion only if they could establish, in addition to devoting their full time to the ministry, that (1) they performed functions normally performed by ministers of orthodox religion, and (2) they show that they were regarded by other Jehovah's witnesses as standing towards them as do the clergy of the orthodox religions. (*Ibid.*, Part IV, Paragraph 3)

Much emphasis is placed by the Court upon the absence of petitioners' names from the certified official list of Jehovah's witnesses forwarded to State Headquarters by National Headquarters of Selective Service System.

The Court said that in promulgating Opinion No. 14 the National Director of Selective Service appended a list of certain members of the Bethel Family and pioneers who were entitled to this exemption. None of these witnesses were on the list. The Opinion stated that "members of the Bethel Family and pioneers whose names did not appear on the list, as well as other Witnesses holding official titles in the organizaition, must be classified by the boards according to the facts in each case." (Slip Opinion, p. 8) Insofar as Thompson and Roisum claimed exemption because of their position of leadership in the congregations as assistant company servants (presiding congregational ministers) and other assistants, their ministerial status could not be affected by their failure to have their names upon the certified official list. Since the list was confined to the Bethel Family and full-time pioneers, there was no

relation whatever between the list and company and assistant company servants. Accordingly, the emphasis which is placed upon the failure to have their names appear on the list is wholly irrelevant.

To begin with, the requirement made by the Selective Service System that the Society file a list of its full-time pioneer ministers with National Headquarters was arbitrary. No other religious organization was required to file a list of its full-time ministers.

The presence or absence of the name of these ministers of Jehovah's witnesses did not justify the local boards or appeal boards in denying petitioners' claims for exemption as ministers of religion under the Act. It was the duty of the draft boards to classify each according to the facts appearing in the files irrespective of the absence of his name from the list of ministers filed with the Selective Service System.

Shortly after the list was completed in June 1941 it was anticipated that names of other full-time ministers would be added to the list. The Selective Service System promulgated a policy allowing for the addition of names to the list upon application made by the Society supported by affidavits of persons familiar with the background and activity of the persons whose names were to be added.

The method of investigating each new individual application of a new full-time pioneer to be added to the list put a heavy burden upon the limited stenographic force and personnel of the section of National Headquarters having charge of the classification of Jehovah's witnesses. Moreover, objections were raised by some local boards that National Headquarters was encroaching upon the original jurisdiction of the local boards in matters of classification by addition of a registrant's name to the list. Accordingly, on October 29, 1942, by State Director Advice No. 88, the Director of Selective Service changed the policy regarding

the adding of names to the list, and discontinued the practice of placing new names thereon.

This Court can take judicial notice of the records of the Selective Service System showing the policy of that agency with respect to Jehovah's witnesses and the arrangements that the Watchtower Society was forced to comply with. The records of the system showed that such Society recognized and certified all of its ministers, including petitioners, whose names were not on that list, to be authentic, duly authorized representatives of it, and it recognized all of its ministers, including these petitioners, as ministers regardless of whether their names appeared on the list which was under the control of the Selective Service System.

When the local boards finally classified the petitioners, the policy had been changed and it was impossible to have their names added to the list. When petitioners were finally classified, the undisputed evidence showed that they were in full-time status as pioneer missionary evangelists with the Society. It was the duty of the boards to classify them according to their status at the time of their classification. The action of the draft boards and the argument of the Government is directly contrary to the decision of the Seventh Circuit Court of Appeals in *United States* ex rel. *Hull* v. *Stalter*, 151 F. 2d 633. In that case the court held that the absence of Hull's name from the list did not justify the arbitrary denial of the claim for exemption as a minister. The court pointed out that the list had been abandoned at the time he was classified and that the failure to have his name on the list was immaterial.

On November 2, 1942, Opinion No. 14 was amended so as no longer to require that a full-time pioneer missionary evangelist of Jehovah's witnesses have his name upon such certified official list. The opinion provided: "The status of members of the Bethel Family and pioneers whose names do not appear upon such certified list shall be determined

under the provisions of paragraph 5 of this Opinion." Paragraph 5 of the Opinion reads:

"5. The members of Jehovah's Witnesses, known by the various names of members of the Bethel Family, pioneers, regional servants, zone servants, company servants, sound servants, advertising servants, and back-call servants, devote their time and efforts in varying degrees to the dissemination of the tenets and beliefs of Jehovah's Witnesses. The deference paid to these individuals by other members of Jehovah's Witnesses also varies in a great degree. It is impossible to make a general determination with respect to these persons as to their relationship to Jehovah's Witnesses. Whether or not they stand in the same relationship as regular or duly ordained ministers in other religions must be determined in each individual case by the local board, based upon whether or not they devote their lives in the furtherance of the beliefs of Jehovah's Witnesses, whether or not they perform functions which are normally performed by regular or duly ordained ministers of other religions, and, finally, whether or not they are regarded by other Jehovah's Witnesses in the same manner in which regular or duly ordained ministers of other religions are ordinarily regarded."

The failure of one of Jehovah's witnesses to have his name appear upon the official list circulated by the Director of Selective Service to all State Headquarters does not militate against his claim for exemption as a minister of religion. It is the duty of the draft boards to consider the facts as revealed by the registrant's file and to classify him according to the Act and Regulations. If it appears that one of Jehovah's witnesses is actually engaged in regularly preaching the gospel of God's kingdom under the direction of a recognized religious organization, the mere fact that his name does not appear on the certified official list of pioneer ministers referred to in Opinion No. 14 or State Director Advice No. 213-B, does not authorize the

boards to reject his claim for exemption as a minister of religion. This is the view taken by the Government in its brief filed in *Benesch* v. *Underwood* (CCA-6) 132 F. 2d 430. There the Government informed the court that "the inclusion of Benesch's name on the list of 'pioneers' maintained at National Headquarters would not, *ipso facto*, entitle him to classification as a minister; neither could it be made a prerequisite to such classification. The inclusion of a name on the list is, at the most, evidence which may be considered by the local board in classifying the registrant. If it were otherwise, the officials at National Headquarters would be usurping the function which Congress delegated solely to the local boards." (See Government brief, p. 15, n. 9 and pp. 17-18)

In a letter from General Hershey, Director of Selective Service, dated July 7, 1943, concerning the certified official list, he said, among other things, "The official list of Jehovah's witnesses, is no more than information from National Headquarters as to those members, who within the limited concept of religious organization, are recognized by the Watchtower Bible and Tract Society as ministers."

While inclusion of the name on the list may be considered by the draft boards in classifying a registrant, the absence of or even removal of a person's name from the list is not made the conclusive and exclusive test. The list was established and was maintained as a convenience by the Selective Service System and the Watchtower Society in taking appeals and other administrative action. It was never considered by the System and the Society to exclude from consideration by boards the exemption claim of other persons whose names did not appear thereon.

It is plain that the right of Jehovah's witnesses to classification as ministers of religion under the Act and Regulations is not confined to those whose names appear upon the certified official list circuited by National Headquarters to the various State Headquarters of the System. Indeed,

Opinion No. 14 (now superseded by State Director Advice No. 213-B) extends to full-time or part-time ministers of Jehovah's witnesses like the petitioners here whose names do not appear on or have been removed from the official list.

It is respectfully submitted that the failure of the petitioners to have their names upon the certified official list should not be considered as basis for the denial by the boards of the claim of the petitioners for exemption as ministers of religion.

The holding of the Court whereby the Court implicitly found that the draft boards had rejected the certificates of the Watchtower Bible and Tract Society, Inc., central legal governing body of Jehovah's witnesses in the United States, is contrary to the basic principle of non-interference with decisions and rulings of ecclesiastical bodies by the judiciary in the United States. In 1871, this Court recognized that findings and decisions of governing bodies of religious organizations were final and conclusive upon the courts. The Court held that such findings could not be impeached. (*Watson* v. *Jones,* 13 Wall. 679) This same principle has not been deviated from by the Court. It has been extended into other situations. It has been held that the propriety of one's religious preachments, doctrines and beliefs are not the subject of judicial review or inquiry. (*United States* v. *Ballard,* 322 U. S. 78. See also the dissent of Mr. Justice Jackson at pages 92-95, his concurring opinion in *Ballard* v. *United States,* 67 S. Ct. 261 at page 265)

The decision of the Court, arrogating unto itself the power of deciding the orthodoxy of Jehovah's witnesses, has converted the Court into a religious hierarchy, with the power of deciding religious questions as well as judicial questions. The Supreme Court of Alabama in reviewing a similar administrative determination under the Conscription Act of the Confederacy during the Civil War, envisioned and avoided the snare into which this Court was led. That was in the case of Ex parte *Cain,* 39 Ala. 440. In

that case the Alabama court said: "Neither this court, nor any other authority, judicial or executive, in this government, is a hierarchy, clothed with the power of determining the orthodoxy of any religious sect or denomination. It does not vary the question, in the present case, that Mr. Cain belonged to a sect of religionists, who perform ministerial labor gratuitously."

In the decision styled In re *Reinhart* (9 Ohio Dec. 441, 445) the court said: "The moment an attempt is made to limit or restrict ordination to some special form of ceremony we begin to discriminate between the diverse modes and forms of ordination practiced by the various religious societies. The laws of Ohio make no discrimination in any respect between Catholic or Protestant, Greek, Gentile, Jewish, or any other religious societies or denominations, much less do they attempt to prescribe any mode or form of ministerial ordination, which is defined in the Standard Dictionary as 'the act or rite of admitting and setting apart to the Christian ministry or to holy orders, especially in the Roman Catholic, Anglican and Greek churches, consecration to the ministry by the laying on of hands of a bishop or bishops; in other churches, consecration by a presbytery, synod, or council of ministers.'"

It cannot be argued that Congress intended to discriminate between ministers of any religious organization. It is highly improper and asking that an unreasonable construction be placed upon the Act to impute to Congress the intention of saying that only some ministers of religion shall be exempt from training and service. Congress did not intend to forge an instrument that may be used to oppress ministers of unpopular and unorthodox religious organizations.

The petitioners accept the holding of the Court in *Estep* v. *United States*, 327 U. S. 114. In the opinion of the Court in that case, the Court said, *inter alia:* "The provision making the decisions of the local boards 'final' means to us that

Congress chose not to give administrative action under this Act the customary scope of judicial review which obtains under other statutes. It means that the courts are not to weigh the evidence to determine whether the classification made by the local boards was justified. The decisions of the local boards made in conformity with the regulations are final even though they may be erroneous. The question of jurisdiction of the local board is reached only if there is no basis in fact for the classification which it gave the registrant." This undoubtedly means that in a case involving the claim for exemption as a minister of religion, if there is no basis in fact for the denial of the claim for exemption, then it would be the duty of the court to hold the order of the board directing the one claiming the exemption to report for work in a C.P.S. camp to be in excess of the jurisdiction of the board.

The petitioners assert that there is no question of weighing the evidence or preponderance of evidence before the boards involved in these cases. The undisputed evidence before the boards showed that each minister was regularly and customarily engaged in preaching and teaching the doctrines and principles of a recognized religious organization at the time of his final classification. Basis in fact in determining whether petitioners are ministers cannot be supported by fantastic inferences or irrelevant matters.

In determining whether or not there is basis in fact for the denial of petitioners' claim for exemption it is the duty of the Court to follow the Regulations defining a minister of religion under the Act, as well as give regard to the administrative interpretations. The Regulations provide that a regular minister or an ordained minister who regularly and customarily preaches and teaches the doctrines and principles of a recognized organization is exempt as a minister of religion.

None of the boards challenged as false the claims made by the petitioners. Neither of the trial courts claimed that

petitioners' evidence before the boards was false. The Government did not indict the petitioners for making false representations to the draft boards. The failure of the Government, the courts below and the draft boards to charge the petitioners with making false representations leaves this Court in the position of having to assume as absolutely true the documentary evidence, undisputed, which was submitted by petitioners to their local boards. Therefore, there was no question about weighing the evidence involved before the courts below or before this Court. Every statement contained in the documentary evidence submitted by the petitioners must be accepted as true.

While the Act says that the determination of the board is "final", this 'finality provision' is confined to cases where there is a dispute of fact. If, as here, the facts are established by the undisputed evidence, then the finality provision does not prevent the Court from applying the law after an independent review of the facts established by the undisputed evidence. Certain it is that Congress did not intend to permit the draft boards to have the power to say that "white" is "black". To do so would hog-tie and hobble the courts and thus prevent them from exercising their judicial function under the Act. Basis in fact does not mean basis in some fantastic inference or arbitrary opinion and conclusion that may be drawn by a draft board upon the undisputed evidence. If the undisputed facts show that one is regularly and customarily preaching and teaching the doctrines and principles of a recognized church (as in the files before the boards in these cases) then there is no basis in fact for the denial of the claim for exemption and the final determination of the administrative agency. According to *Estep* v. *United States*, 327 U. S. 114, "decisions of the local boards made in conformity with the regulations are final even though they may be erroneous." An erroneous determination made upon disputed facts is in conformity with the Regulations and is final. We have no such deter-

mination here. On the contrary, the determinations of the boards were contrary to the evidence and departures from the Act and the Regulations. Therefore they were not "in conformity with the regulations".

To assume that the boards based their determinations upon age, previous secular occupation, previous training, physical condition, former classifications and other matters similarly not having anything to do with whether at the time the petitioners were regularly and customarily teaching and preaching the doctrines and principles of Jehovah's witnesses, is to permit the draft boards to defy the Act. It allows them to make decisions in the teeth of the evidence. It permits them to decide dishonestly. It grants them authority to make determinations beyond their jurisdiction. Certainly Congress did not intend that the boards should have the power to consider irrelevant and immaterial matters and ignore true criteria in determining whether or not one is exempt as a minister.

The doctrine of "no basis in fact" announced in *Estep* v. *United States*, 327 U. S. 114, as applied in this case, has here formed a rule which results in the very evil which *Estep* condemned, and which was made the basis by the Court for the reversal of *Smith* and *Estep*. This is called to the Court's attention by Mr. Justice Murphy in his dissent in these cases where he said, among other things, that "care must be taken to preclude the review of the classification by standards which allow the judge to do little more than give automatic approval to the draft board's action. Otherwise the right to prove the invalidity of the classification is drained of much of its substance and the trial becomes a mere formality." (See page 1 of his dissent in these cases.)

Has not the Court run around in a circle in considering these cases under the Act? The very thing which the Court found to be error in the *Estep*, *Smith*, *Gibson*, and *Dodez* cases has been approved by the decision of the Court in

these cases. The recrudescence by this Court of the misinterpretation of the *Falbo* decision, condemned in *Estep*, makes void all that was done by the Court in *Estep, Smith, Gibson* and *Dodez*. The lower courts misinterpreted *Falbo* in *Smith, Estep, Gibson* and *Dodez*. The lower courts misinterpreted *Falbo* in these cases. The misinterpretation of *Falbo*, which resulted in the conviction of the petitioners here, can no more be sustained here than it could be in *Smith* and *Dodez*. The results here should have been the same as in *Smith, Estep, Gibson* and *Dodez*.

It is respectfully submitted that the entire Court has overlooked an important point in interpreting Section 11 of the Act. Section 11 of the Act provides that those who violate their duty under the Act shall be prosecuted in the District Court. In prosecutions for conspiracy to evade or counsel evasion, under Section 11 of the Act the right of trial by jury is allowed. In a prosecution under Section 11 of the Act, where the accused is charged with making false statements to his draft board, the right of trial by jury to pass upon the veracity of the statements made is guaranteed.

Section 5 (d) of the Act requires one claiming exemption as a minister of religion to register, and that is all. If he is a minister that should end the matter, unless it can be proved that the person claiming exemption as a minister lied. If his claim is not shown to be false, then the exemption automatically should follow. The issuance of an order in the face of the claim for exemption, not proved to be false, is submitted to be out of harmony with the Regulations and, therefore, in excess of the jurisdiction of the local board. In prosecutions under Section 11 of the Act it should be the prerogative of the jury to determine whether or not the registrant has a duty to perform. The pertinent parts of Section 11 provide that any "person charged as herein provided with the duty of carrying out of the provisions of this Act, or the rules or regulations made or direc-

tions given thereunder, who shall knowingly fail or neglect to perform such duty, . . . or who in any manner shall knowingly fail or neglect to perform any duty required of him under or in the execution of this Act, . . . shall, upon conviction in the district court of the United States having jurisdiction thereof, be punished by imprisonment for not more than five years or fine of not more than $10,000, or both such fine and imprisonment. . . . "

In determining whether or not the petitioners had a duty under the Act, it should be the responsibility of the jury, in cases where there are any different inferences of fact to be drawn, to pass upon whether or not the petitioners committed perjury or falsely claimed to be ministers. Perjury or the making of false statements as a basis for prosecution under Section 11 of the Act is for the jury. Such should be the rule here. It seems that what Mr. Justice Frankfurter said in his concurring opinion in *Estep* v. *United States,* 327 U. S. 114, is correct. There he said: "As in situations of comparable legal significance, a trial court may of course leave controverted issues of fact to the jury." (327 U. S. at page 145; see also the decision of the Third Circuit Court of Appeals in *United States* v. *Zieber,* 161 F. 2d 90, holding that these various issues of fact should be submitted to the jury.)

Especially should this be true upon the issues of the statutory exemption of one as a minister of religion. In this connection the holding of the Court that the claim for exemption as a minister of religion under the Act does not present a jurisdictional fact but may be determined *de novo* and the distinction of *Ng Fung Ho* v. *White,* 259 U. S. 276, is fallacious.

The distinction of *Ng Fung Ho* v. *White* at page 12 of the slip Opinion is a distinction without a difference. The claim of exemption from deportation on account of American citizenship is not at all different from the claim of exemption from a duty under the Act because of being a

regular or duly ordained minister. The right to a judicial hearing of one's claim to exemption as a minister under the Act has been recognized in *Estep* v. *United States*, 327 U. S. 114, as required as a matter of due process.

Petitioners, like Ng Fung Ho, could not get a judicial hearing before the draft boards, as Ng Fung Ho could not before the Commissioner of Immigration. Since deportation involves a loss no greater than the conviction of a felony, which also involves the loss "of all that makes life worth living", this Court should also hold that the "judicial" trial of petitioners before the draft boards may be tested in these proceedings. If due process gave Ng Fung Ho a judicial hearing then, by force of the same reasoning, it should give these petitioners a judicial hearing. They have not yet received a judicial hearing because the Court has accepted the findings of the draft boards as conclusive. The findings of the draft boards were made conclusive by this Court in justifying the "basis in fact for the classification" upon matters wholly irrelevant to whether the petitioners were exempt as ministers of religion under the Act and Regulations.

Has not the Court by this sophistry and factitious syllogism permitted the guilt of the petitioners under the Act to be determined by the draft boards in these cases, where they have been denied the right of counsel? What good did it do petitioners to have counsel in the District Court, the Court of Appeals, and in the Supreme Court if the determination of guilt is by an administrative agency (where they were denied counsel) accepted by this Court as conclusive? Has not the Court, in examining the judgments of conviction, following a trial in the District Court (where there was no effort whatever to inquire into the validity of the draft board proceedings because of misapplication of *Falbo* v. *United States*) accepted as final and conclusive the star-chamber proceedings of an administra-

tive agency and executed such approval by invoking the criminal sanctions of the Act?

"No bill of attainder or *ex post facto* law shall be passed."

"A bill of attainder is a legislative act which inflicts punishment without a judicial trial.

"If the punishment be less than death, the act is termed a bill of pains and penalties. Within the meaning of the Constitution, bills of attainder include bills of pains and penalties." *Cummings* v. *Missouri*, 4 Wall. 277.

In *Kentucky* v. *Jones*, 10 Bush (70 Ky.) 725, the Kentucky Court of Appeals held another act of the legislature violated the bill of attainder provision of the Constitution. The act provided for certain disqualifications of officeholders within the Commonwealth. Administrative agencies, called "boards of contest", were established. The findings of these boards were made final by the statute with reference to the disqualification of an officeholder. If such boards found an officeholder to be disqualified, he was ordered to cease and desist from holding office. A refusal to cease and desist from holding the office constituted a crime under the statute. Jones was declared disqualified and ordered to vacate his office; and despite the order he held office and refused to vacate. He was indicted and convicted for failing and refusing to obey the order of the administrative agency. The court said:

" . . . it will be seen at once that the construction converts that section into a bill of pains and penalties, and thereby makes it repugnant to that clause of the federal constitution which provides that 'no state shall pass any bill of attainder'. . . . The statute created a 'contest' board, whose decision shall be final—binding and conclusive on the courts . . .

" . . . when the courts are called upon to enforce the judgments of the board, or to punish those who disobey its mandates, they have the power to inquire into and deter-

mine as to its jurisdiction in the particular case in hand. Without jurisdiction to act, the finding and judgment of any board or tribunal is necessarily void, and may be so treated by all the world. . . .

"To admit that a contesting board may determine finally as to what constitutes legal disqualification for office would be to decide that the legislature, instead of confining these tribunals to the discharge of executive duties, and to the determination primarily of mere questions of fact, had, in disregard of the powers of government, existing by virtue of the first article of the constitution, created a high judicial tribunal—a court with powers and authority to determine finally and conclusively questions of individual rights arising under the constitution—and provided that it should be composed exclusively of high executive officers."

An act which undertakes to permit an administrative agency to inflict punishment, banishment or exile from the United States of a citizen, without judicial inquiry as to whether or not he was a citizen, was held to violate the bill of attainder clause of the Constitution, in the case styled In re *Yung Sing Hee* (Circuit Court. Oregon) 36 F. 437 (1888).

A statute of Iowa which provided for "vasectomy" of habitual criminals upon the finding of an administrative agency without judicial inquiry was declared to be a bill of attainder in *Davis* v. *Berry*, 216 F. 413.

Recently the Court, in reaching back to *Cummings* v. *Missouri*, 4 Wall. 277, had occasion to again reaffirm the doctrine which condemns the denial of judicial trials. An Act of Congress was held to be invalid as a bill of pains and penalties in *United States* v. *Lovett*, 66 S. Ct. 1073. A reference is made to the discussion in the opinions filed in this case for a more extensive discussion of the history of bills of attainder. See also the concurring opinion of Mr. Justice Black in *Keegan* v. *United States*, 325 U. S. 478, 495-498. A further discussion of the subject was made by Mr. Justice

Black in his dissenting opinion in the case of In re *Summers*, 325 U. S. 561, 573. Reference is also made to the discussion on this subject appearing in the Brief for Petitioners filed in *Smith* v. *United States*, No. 66 October Term, 1945, and in *Estep* v. *United States*, No. 292 October Term, 1945, at pages 95 to 105, inclusive.

CONTROLLING OPINION WILL NOT BECOME PRECEDENT

Since 1943 the Government and Jehovah's witnesses have been asking the Court to write an opinion upon the ministerial status of Jehovah's witnesses which would become precedent. In spite of the decision in this case the controlling opinion does not become precedent. The controlling opinion is opposed by an opinion of the minority which is of equal weight. The decision in this case is authority only upon the general result reached. (*City of Dubuque* v. *Illinois Central R. Co.*, 39 Iowa, 56; *Mapes* v. *Burns*, 72 Mo. App. 411; *State* ex rel. *People's Bank of Greenville* v. *Goodwin*, 81 S. C. 419) Upon such an important question as is involved in this case and especially after four years of asking the Court to settle the controversy it seems that an opinion would have been written by the Court which would have settled the law. As the law stands now, with a divided-court opinion and Mr. Justice Frankfurter concurring in the results reached by the justices who joined in the controlling opinion, the law is left in a state of muddled confusion. If, for no other reason alone than to

settle the matter so as to get a unanimous opinion of the majority the case should be ordered reargued and for that reason the petition for rehearing should be granted. Perhaps upon another argument one of the justices who joined on either side will be able to make up his mind sufficiently to join in the opinion of the controlling or dissenting side.

In the results of Mr. Justice Frankfurter's concurring in the controlling opinion only as to the decision but not as to the opinion of the four justices that joined in it there is presented a situation that is remarkable. It is reached only by the muddled and confused condition in which the law was left in *Downes* v. *Bidwell*, 182 U. S. 244. This decision dealt with the political status of the insular possessions acquired in the Spanish War. The judgment of the Court was announced by Mr. Justice Brown who filed the controlling opinion. A separate opinion was filed by Mr. Justice White, who concurred "in the results" only but for "reasons different from, if not in conflict with, those expressed in" the controlling opinion. Mr. Justice Gray agreed with the controlling opinion in substance only but not in detail. The Chief Justice and Mr. Justice Harlan filed dissenting opinions which were concurred in by Mr. Justice Brewer and Mr. Justice Peckham.

It seems therefore that on such an important question as is involved here which has not been settled by the Court but which should be settled more explicitly and clearly the cause should be reargued so that the mind of a majority of the Court can be made up so that a unanimous majority opinion rather than a decision can be reached.

Conclusion

Wherefore petitioners pray that the order and judgment heretofore entered herein, affirming the judgment of the court below, be set aside and held for naught and that, on the briefs heretofore submitted, this petition for rehearing be granted and order the cause to be reargued orally. Petitioners pray for such other relief as they may show themselves justly entitled to in the premises.

WESLEY WILLIAM COX

THEODORE ROMAINE THOMPSON

WILLIAM ROISUM

Petitioners

By HAYDEN C. COVINGTON
Counsel for Petitioners

Certificate

I, the undersigned counsel for petitioners, do hereby certify that the foregoing petition for rehearing is prepared and filed in good faith so that justice may be done, and not for the purpose of delay.

HAYDEN C. COVINGTON
Counsel for Petitioners

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SUPREME COURT OF THE UNITED STATES

Nos. 66–68.—October Term, 1947.

Wesley William Cox, Petitioner, 66 v. The United States of America. Theodore Romaine Thompson, Petitioner, 67 v. The United States of America. Wilbur Roisum, Petitioner, 68 v. The United States of America.	On Writs of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[November 24, 1947.]

Mr. Justice Reed announced the judgment of the Court and delivered an opinion in which The Chief Justice, Mr. Justice Jackson, and Mr. Justice Burton join.

These cases present the question of the scope of review of a selective service classification in a trial for absence without leave from a civilian public service camp. Petitioners are Jehovah's Witnesses who were classified as conscientious objectors despite their claim to classification as ministers of religion. Ministers are exempt from military and other service under the Act. All three petitioners exhausted their remedies in the selective service process and complied with the order of the local board directing them to report to camp. Cox and Thompson were indicted for leaving the camp without permission, and Roisum was indicted for failing to return after proper leave, in violation of § 11 of the Selective Training and Service Act of 1940. 54 Stat. 885, 57 Stat. 597, 50 U. S. C. Appendix 301–318.

On their trials petitioners requested directed verdicts, at appropriate times, because the selective service orders were invalid and requested the court to charge the jury that they acquit petitioners if they found that they were ministers of religion and therefore exempt from all service. The trial judge did not grant petitioners' requests, however, and instructed the juries that they were not to concern themselves with the validity of the classification orders. Petitioners were convicted, and on appeal to the Circuit Court of Appeals their convictions were affirmed. We granted certiorari in order to resolve questions concerning the submission to the jury of evidence, to wit, the files of the local board of the selective service system, as relevant to the charge of violation of selective service orders. —U. S. —.

Petitioner Cox registered under the Selective Training and Service Act on October 16, 1940, and in his questionnaire stated that he was 22 years old and had been employed as a truck driver since 1936. The local board classified him IV–F, as not physically fit for service, on January 31, 1941, and on March 10, 1942, changed the classification to I–A. Ten days later Cox filed a request for reclassification as IV–E (conscientious objector), stating that he had become a Jehovah's Witness in January 1942. The board at first rejected the claim, but on June 12 of the same year granted him the requested classification. Ten days later petitioner first made his claim for total exemption from service, claiming to be a minister of religion; the local board refused the exemption and its action was sustained by the board of appeal. On May 18, 1944, the board ordered Cox to report to camp, and on May 26 he complied and then immediately left camp and did not return.

Upon trial Cox's selective service file was received in evidence. It contained an ordination certificate from the Watch Tower Bible and Tract Society stating that Cox was "a duly ordained minister of the Gospel" and that his

"entire time" was devoted to missionary work. The file also contained an affidavit of a company servant, Cox's church superior, dated October 29, 1942, stating that Cox "regularly and customarily serves as a minister by going from house to house and conducting Bible Studies and Bible Talks." There was also an affidavit by Cox, dated October 28, 1942, stating that he was enrolled in the "Pioneer service" on October 16 and that he was "able to average 150 hours per month to my ministerial duties without secular work." He added that "my entire time will be devoted to preaching the Gospel as a pioneer." Cox testified at the trial in October 1944 as to his duties as a minister that he preached from house to house, conducted funerals, and "instructed the Bible" in homes. No evidence was introduced showing the total amount of time Cox had spent in religious activities since October 16, 1942. Nor was there evidence of the secular activities of Cox nor the time employed in them. Although the selective service file was introduced in evidence, and the trial court denied the motion for a directed verdict, it does not appear that the trial judge examined the file to determine whether the action of the local board was arbitrary and capricious or without basis in fact. At that time the lower federal courts interpreted *Falbo* v. *United States*, 320 U. S. 549, as meaning that no judicial review of any sort could be had of a selective service order. In *Estep* v. *United States*, 327 U. S. 114, we held that a limited review could be obtained if the registrant had exhausted his administrative remedies, and the Circuit Court of Appeals in accordance with that decision reviewed the file of Cox and found that the evidence was "substantially in support" of the classification found by the board.

Petitioner Thompson also registered on October 16, 1940, claiming exemption as a minister. He stated in his questionnaire that he was 30 years old and that for the past 13 years he had operated a grocery store and had been

a minister since August 1, 1940. At first the local board gave him a deferred classification because of dependency, but then changed his classification to IV–E. Thompson appealed to the board of appeal on November 5, 1943, explaining his duties as a minister and presenting a full statement of his argument that as a colporteur he was within the exemption for ministers as interpreted by selective service regulations. He attached an affidavit from the company servant, which stated that Thompson during the preceding twelve months had devoted 519½ hours to "field service," representing time spent in going from house to house, and making "back-calls on the people of good will," but not including time spent in conducting studies at the "local Kingdom Hall." Another affidavit from the company servant stated that Thompson was an ordained minister of the Gospel, that he was serving as assistant company servant, and that he was a "School Instructor in a Course in Theocratic Ministry." Thompson also attached three certificates from the national headquarters of the Watch Tower Bible and Tract Society which stated that Thompson had been associated with the Society since 1941, that he served as assistant company servant and Theocratic Ministry Instructor, and also as advertising servant and book study conductor. Unlike the other two petitioners, Thompson did not introduce an ordination certification from national headquarters stating that he devoted his entire time as a minister. Thompson also filed a statement signed by twelve Witnesses which stated that they regarded Thompson as an ordained minister of the gospel. No evidence was submitted indicating any change in Thompson's activities in operating his grocery store. The board of appeal sustained the local board in its classification, the board ordered Thompson to report to camp, and on April 18, 1944, he reported and immediately left. Thompson's trial followed the same pattern as Cox's, except that

Thompson was not allowed to testify concerning his duties as a minister.

Petitioner Roisum also registered on the initial registration day, and filed a questionnaire stating that he was 22 years old, that he had worked for the past 15 years as a farmer, and that he was ordained as a minister in June 1940. Roisum made claim to a minister's exemption but at the same time submitted an affidavit signed by his father saying that petitioner was necessary to the operation of his father's farm. In June 1942 Roisum filed a conscientious objector's form claiming exemption from both combatant and non-combatant military service; this form was apparently filed under misapprehension, since Roisum did not abandon his contention that he should be classified as a minister. In the form he stated that he preached the gospel of the Kingdom at every opportunity. Roisum also enclosed a letter from national headquarters of the Society stating that Roisum had been affiliated with the Society since 1936, that he had been baptized in 1940 and "was appointed direct representative of this organization to perform missionary and evangelistic service in organizing and establishing churches and generally preaching the Gospel of the Kingdom of God in definitely assigned territory in 1941" and that Roisum devoted his "entire time" to missionary work and was a duly ordained minister. The local board classified Roisum as a conscientious objector to combat service (I–A–O), and Roisum appealed on June 30, 1943. Roisum attached an affidavit from his company servant stating that Roisum was an assistant company servant, a back call servant, and book study conductor, and that by performance of these duties Roisum had acquitted himself as a "regular minister of the gospel." The company servant submitted a schedule showing the number of hours which Roisum had spent in religious activities for six months from October 1942 to March 1943, ranging

from as little as 11 hours per month to as many as 69, averaging about 40. The board of appeal changed the classification to IV–E and rejected Roisum's request that an appeal be taken to the President. Roisum was ordered to report to camp, disobeyed the order, and was arrested and indicted. The trial court declared a mistrial on Roisum's undertaking to obey the board's order and seek release on *habeas corpus*. Roisum subsequently failed to comply, apparently because of transportation difficulties, but finally reported to camp on May 23, 1944, as directed. He remained in camp for five days, left on a week-end pass, and never returned.

Upon trial Roisum made no effort to introduce new evidence showing the nature of his duties as a minister. He did request the court to charge that if the decision of the local board erroneously classified him in IV–E the order was void and after conviction he moved for a judgment of acquittal or a new trial on the ground that the evidence in his selective service file showed that the classification of the board was arbitrary and capricious. The trial judge examined the file and concluded that there was no ground to support Roisum's motion.

Petitioners are entitled to raise the question of the validity of their selective service classifications in this proceeding. They have exhausted their remedies in the selective service process, and whatever their position might be in attempting to raise the question by writs of *habeas corpus* against the camp custodian, they are entitled to raise the issue as a defense in a criminal prosecution for absence without leave. *Gibson* v. *United States*, 329 U. S. 338, 351–360. The scope of review to which petitioners are entitled, however, is limited; as we said in *Estep* v. *United States*, 327 U. S. 114, 122–23: "The provision making the decisions of the local boards 'final' means to us that Congress chose not to give administrative action under this Act the customary scope of judicial review which obtains under other statutes. It

means that the courts are not to weigh the evidence to determine whether the classification made by the local boards was justified. The decisions of the local boards made in conformity with the regulations are final even though they may be erroneous. The question of jurisdiction of the local board is reached only if there is no basis in fact for the classification which it gave the registrant." Compare *Eagles* v. *United States ex rel. Samuels*, 329 U. S. 304, and *Eagles* v. *United States ex rel. Horowitz*, 329 U. S. 317, in which a similar scope of review is enunciated in *habeas corpus* proceedings by registrants claiming to have been improperly inducted.

Section 5 (d) of the Selective Training and Service Act provides that "regular or duly ordained ministers of religion" shall be exempt from training and service under the Act, and § 622.44 of Selective Service Regulations defines the terms "regular minister of religion" and "duly ordained minister of religion."[1] In order to

[1] 54 Stat. 885, 888:

"SEC. 5. . . .

"(d) Regular or duly ordained ministers of religion, and students who are preparing for the ministry in theological or divinity schools recognized as such for more than one year prior to the date of enactment of this Act, shall be exempt from training and service (but not from registration) under this Act."

Selective Service Regulations, 32 C. F. R., 1941 Supp.:

Section 622.44. *"Class IV–D: Minister of religion or divinity student.* (a) In Class IV–D shall be placed any registrant who is a regular or duly ordained minister of religion or who is a student preparing for the ministry in a theological or divinity school which has been recognized as such for more than 1 year prior to the date of enactment of the Selective Training and Service Act (September 16, 1940).

"(b) A 'regular minister of religion' is a man who customarily preaches and teaches the principles of religion of a recognized church, religious sect, or religious organization of which he is a member, without having been formally ordained as a minister of religion; and who is recognized by such church, sect, or organization as a minister.

"(c) A 'duly ordained minister of religion' is a man who has been

aid the local boards in applying the regulation, the Director of Selective Service issued Opinion No. 14 (amended) on November 2, 1942,[2] which described the tests to be applied in determining whether Jehovah's Witnesses were entitled to exemption as ministers, regular or ordained. The opinion stated that Witnesses who were members of the Bethel Family (producers of religious supplies) or pioneers, devoting all or substantially all of their time to the work of teaching the tenets of their religion, generally were exempt, and appended a list of certain members of the Bethel Family and pioneers who were entitled to this exemption. None of these Witnesses were on the list. The opinion stated that members of the Bethel Family and pioneers whose names did not appear on the list, as well as all other Witnesses holding official titles in the organization, must be classified by the boards according to the facts in each case. The determining criteria were stated to be "whether or not they devote their lives in the furtherance of the beliefs of Jehovah's Witnesses, whether or not they perform functions which are normally performed by regular or duly ordained ministers of other religions, and, finally, whether or not they are regarded by other Jehovah's Witnesses in the same manner in which regular or duly ordained ministers of other religions are ordinarily regarded." The opinion further stated that the local board should place in the registrant's file "a record of all facts entering into its determination for the reason that it is legally necessary that the record show the basis of the local board's decision."

It will be observed that § 622.44 of the regulation makes "ordination" the only practical difference between a "reg-

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ordained in accordance with the ceremonial ritual or discipline of a recognized church, religious sect, or religious organization, to teach and preach its doctrines and to administer its rites and ceremonies in public worship; and who customarily performs those duties."

[2] Opinion 14 (amended) is on file at the Office of Selective Service Records, Washington, D. C.

ular" and a "duly ordained minister." This seems consistent with § 5 of the Act. We are of the view that the regulation conforms to the Act and that it is valid under the rule making power conferred by § 10 (a). We agree, also, that Opinion 14 furnishes a proper guide to the interpretation of the Act and Regulations.

Our examination of the facts, as stated herein in each case, convinces us that the board had adequate basis to deny to Cox, Thompson and Roisum classification as ministers, regular or ordained. We confine ourselves to the facts appearing in the selective service files of the three petitioners, although the only documents dealing with the petitioners' status as ministers were submitted by petitioners themselves. The documents show that Thompson and Roisum spent only a small portion of their time in religious activities, and this fact alone, without a far stronger showing than is contained in either of the files of the registrants' leadership in church activities and the dedication of their lives to the furtherance of religious work, is sufficient for the board to deny them a minister's classification. As for Cox, the documents suggest but do not prove that Cox spent full time as a "pioneer" between October 1942 and May 1944 when he was ordered to camp. As he made claim of conscientious objector classification only after he was reclassified I–A from IV–F and still later claimed ministerial exemption, the board was justified in deciding from the available facts that Cox had not established his ministerial status. The board might have reasonably held that nothing less than definite evidence of his full devotion of his available time to religious leadership would suffice under these circumstances.[3] Nor

[3] For a similar conclusion under the same subdivision of the statute, giving exemption to regular and duly ordained ministers of religion and students, see *Eagles* v. *Samuels*, 329 U. S. 304, 316–17:

"Nor can we say there was no evidence to support the final classification made by the board of appeal. Samuels' statement that he was best fitted to be a Hebrew school teacher and spiritual leader, the

may Cox and Thompson complain that the district court failed to pass on the validity of the classification orders. If there was error of the district court in failing to examine the files of the board to determine whether or not there was basis for their classification, it was cured in the Circuit Court of Appeals by that court's examination.

Petitioners do not limit themselves to the claim that directed verdicts should have been entered in their favor because of the invalidity of their classifications as a matter of law; they claim that the issue should have been submitted with appropriate instructions to the jury.[4] The charge requested by Roisum that he be acquitted if the jury found that he was "erroneously" classified was improper. In *Estep* v. *United States* it was distinctly stated that mere error in a classification was insufficient grounds for attack. Cox and Thompson requested charges under which the jury would determine "whether or not the defendant is a minister of religion" without considering the action of the local board. We hold that

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two-year interruption in his education, his return to the day session of the seminary in the month when his selective service questionnaire was returned, and the fact that the seminary in question was apparently not preparing men exclusively for the rabbinate make questionable his claim that he was preparing in good faith for the rabbinate. A registrant might seek a theological school as a refuge for the duration of the war. Congress did not create the exemption in § 5 (d) for him. There was some evidence that this was Samuels' plan; and that evidence, coupled with his demeanor and attitude, might have seemed more persuasive to the boards than it does in the cold record. Our inquiry is ended when we are unable to say that the board flouted the command of Congress in denying Samuels the exemption."

[4] The Circuit Court of Appeals on April 5, 1946, ordered the judgments in these cases reversed on the ground that the jury should have passed on petitioners' claims. Upon rehearing the opinion was withdrawn, and on October 4 the court handed down an opinion affirming the judgments. In *Smith* v. *United States*, 157 F. 2d 176, the Circuit Court of Appeals held that the submission of the issue of classification to the jury constituted reversible error. But cf. *United States ex rel. Kulick* v. *Kennedy*, 157 F. 2d 811.

such a charge would also have been improper. Whether there was "no basis in fact" for the classification is not a question to be determined by the jury on an independent consideration of the evidence. The concept of a jury passing independently on an issue previously determined by an administrative body or reviewing the action of an administrative body is contrary to settled federal administrative practice; the constitutional right to jury trial does not include the right to have a jury pass on the validity of an administrative order. *Yakus* v. *United States*, 321 U. S. 414. Although we held in *Estep* that Congress did not intend to cut off all judicial review of a selective service order, petitioners have full protection by having the issue submitted to the trial judge and the reviewing courts to determine whether there was any substantial basis for the classification order. When the judge determines that there was a basis in fact to support classification, the issue need not and should not be submitted to the jury. Perhaps a court or jury would reach a different result from the evidence but as the determination of classification is for selective service, its order is reviewable "only if there is no basis in fact for the classification." *Estep* v. *United States, supra*, 122. Consequently when a court finds a basis in the file for the board's action that action is conclusive. The question of the preponderance of evidence is not for trial anew. It is not relevant to the issue of the guilt of the accused for disobedience of orders. Upon the judge's determination that the file supports the board, nothing in the file is pertinent to any issue proper for jury consideration.[5]

Petitioners also claim that they were denied the right to introduce new evidence at the trial to support their

[5] For an analogous power of a judge as to admissibility, see Wigmore (3d ed.) § 2550; *Steele* v. *United States No. 2*, 267 U. S. 505, 510–11; *Ford* v. *United States*, 273 U. S. 593, 605; *Doe dem. Jenkins* v. *Davies*, 10 Ad. & El. N. S., 314, 323–24; Phipson, Evidence (8th ed.), p. 9.

contention that the orders were invalid. Roisum made no attempt to introduce such evidence, Cox was in fact allowed to testify as to his duties as a minister, and only Thompson was denied the opportunity so to testify. Thompson did not specify this point as error in his appeal to the Circuit Court of Appeals. Passing the possible waiver on the part of Thompson by failing to argue this point below, we hold that his contention is without merit. Petitioner claims that his status as a minister is a "jurisdictional fact" which may be determined *de novo* (reexamination of the record of the former hearing with right to adduce additional evidence) in a criminal trial, and relies on *Ng Fung Ho* v. *White*, 259 U. S. 276, where we held that an alleged alien was entitled to a judicial trial on the issue of alienage in *habeas corpus* proceedings. But that case is different from this. The alien, there, claimed American citizenship. As such, this Court said, he had a right to a judicial hearing of his claim as a matter of due process. This he could not get before the Commissioner of Immigration. Therefore, since the deportation of a citizen may involve loss "of all that makes life worth living," this Court decided that the "jurisdiction" of the Commissioner to try the alleged alien could be tested by *habeas corpus*. P. 284. That gave the alleged alien a judicial hearing. In these cases judicial review of administrative action is allowed in the criminal trial. This assures judicial consideration of a registrant's rights. Petitioners' objection on this point is in essence that the review is limited to evidence that appeared in the administrative proceeding. It seems to us that it is quite in accord with justice to limit the evidence as to status in the criminal trial on review of administrative action to that upon which the board acted.* As we have said else-

*See *Goff* v. *United States*, 135 F. 2d 610, and *United States* v. *Messersmith*, 138 F. 2d 599.

where the board records were made by petitioners. It was open to them there to furnish full information as to their activities. It is that record upon which the board acted and upon which the registrants' violation of orders must be predicated.

We perceive no error to petitioners' prejudice in the records.

Affirmed.

MR. JUSTICE FRANKFURTER concurs in the result.

SUPREME COURT OF THE UNITED STATES

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Wesley William Cox, Petitioner,
66 v.
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On Writs of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[November 24, 1947.]

Mr. Justice Douglas, with whom Mr. Justice Black concurs, dissenting.

I agree with the majority of the Court that we can reverse the judgments below only if there was no basis in fact for the classification. I also agree that that question is properly one of law for the Court. To that extent I join in the opinion of the Court. But I do not agree that the local boards had adequate basis to deny to petitioners the classification of ministers. My disagreement is required by what I conceive to be the mandate of Congress, that all who preach and teach their faith and are recognized as ministers within their religious group are entitled to the statutory exemption.

The exemption runs to "regular or duly ordained ministers of religion." There is no suggestion that only ministers of the more orthodox or conventional faiths are included. Nor did Congress make the availability of the exemption turn on the amount of time devoted to religious activity. It exempted all regular or duly or-

dained ministers. Hence, I think the Selective Service Regulations properly required that a "regular" minister, as distinguished from a "duly ordained" minister,[1] only be one who "customarily preaches and teaches the principles of religion of a recognized church, religious sect, or religious organization of which he is a member, without having been formally ordained as a minister of religion; and who is recognized by such church, sect, or organization as a minister." 32 C. F. R., Cum. Supp. § 622.44 (b).

It is not disputed that Jehovah's Witnesses constitute a religious sect or organization. We have, moreover, recognized that its door-to-door evangelism is as much religious activity as "worship in the churches and preaching from the pulpits." *Murdock* v. *Pennsylvania*, 319 U. S. 105, 109. The Selective Service files of these petitioners establish, I think, their status as ministers of that sect. Their claims to that status are supported by affidavits of their immediate superiors in the local group and by their national headquarters. And each of them was spending substantial time in the religious activity of preaching their faith. If a person is in fact engaging in the ministry, his motives for doing so are quite immaterial.[2]

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[1] A "duly ordained" minister is defined as one "who has been ordained in accordance with the ceremonial ritual or discipline of a recognized church, religious sect, or religious organization, to teach and preach its doctrines and to administer its rites and ceremonies in public worship; and who customarily performs those duties." 32 C. F. R. Cum. Supp. § 622.44 (c).

The distinction between "regular" and "duly ordained" ministers is, I think, more than the ordination of the latter. The "duly ordained" minister performs all the customary functions of a minister of a church. The concept of "regular" minister more nearly fits those who, like Jehovah's Witnesses, follow less orthodox or conventional practices.

[2] *Eagles* v. *Samuels*, 329 U. S. 304, is not controlling here. It involved the exemption given students preparing for the ministry. Mere presence in a school not exclusively confined to preparing men for the rabbinate did not entitle the student to exemption.

To deny these claimants their statutory exemption is to disregard these facts or to adopt a definition of minister which contracts the classification provided by Congress.

The classification as a minister may not be denied because the registrant devotes but a part of his time to religious activity. It is not uncommon for ordained ministers of more orthodox religions to work a full day in secular occupations, especially in rural communities. They are nonetheless ministers. Their status is determined not by the hours devoted to their parish but by their position as teachers of their faith. It should be no different when a religious organization such as Jehovah's Witnesses has part-time ministers. Financial needs may require that they devote a substantial portion of their time to lay occupations. And the use of part-time ministers may be dictated by a desire to disseminate more widely the religious views of the sect. Whatever the reason, these part-time ministers are vehicles for propagation of the faith; by practical as well as historical standards they are the apostles who perform the minister's function for this group.

SUPREME COURT OF THE UNITED STATES

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[November 24, 1947.]

Mr. Justice Murphy, with whom Mr. Justice Rutledge concurs, dissenting.

With certain limitations, this Court has recognized that a person on trial for an alleged violation of the Selective Training and Service Act has the right to prove that the prosecution is based upon an invalid draft board classification. But care must be taken to preclude the review of the classification by standards which allow the judge to do little more than give automatic approval to the draft board's action. Otherwise the right to prove the invalidity of the classification is drained of much of its substance and the trial becomes a mere formality. Such empty procedure has serious connotations, especially when we deal with those who claim they have been illegally denied exemptions relating to conscientious beliefs or ministerial status.

Specifically, I object to the standard of review whereby the draft board classification is to be sustained unless there is no evidence to support it. Less than a substantial amount of evidence is thus permitted to legalize the clas-

sification. Whatever merit this standard may have in other situations, I question the propriety of its use in this particular setting. This differs from an ordinary civil proceeding to review a non-punitive order of an administrative agency, an order which is unrelated to freedom of conscience or religion. This is a criminal trial. It involves administrative action denying that the defendant has conscientious or religious scruples against war, or that he is a minister. His liberty and his reputation depend upon the validity of that action. If the draft board classification is held valid, he will be imprisoned or fined and will be branded as a violator of the nation's law; if that classification is unlawful, he is a free man. Moreover, he has had no previous opportunity to secure a judicial test of this administrative action, no chance to prove that he was denied his statutory rights. Everything is concentrated in the criminal proceeding.

These stakes are too high, in my opinion, to permit an inappreciable amount of supporting evidence to sanction a draft board classification. Since guilt or innocence centers on that classification, its validity should be established by something more forceful than a wisp of evidence or a speculative inference. Otherwise the defendant faces an almost impossible task in attempting to prove the illegality of the classification, the presence of a mere fragment of contrary evidence dooming his efforts. And such a scant foundation should not justify brushing aside bona fide claims of conscientious belief or ministerial status. If respect for human dignity means anything, only evidence of a substantial nature warrants approval of the draft board classification in a criminal proceeding.

It is needless to add that, from my point of view, the proof in these cases falls far short of justifying the conviction of the petitioners. There is no suggestion in the record that they were other than bona fide ministers.

And the mere fact that they spent less than full time in ministerial activities affords no reasonable basis for implying a non-ministerial status. Congress must have intended to exempt from statutory duties those ministers who are forced to labor at secular jobs to earn a living as well as those who preach to more opulent congregations. Any other view would ascribe to Congress an intention to discriminate among religious denominations and ministers on the basis of wealth and necessity for secular work, an intention that I am unwilling to impute. Accordingly, in the absence of more convincing evidence, I cannot agree that the draft board classifications underlying petitioners' convictions are valid.